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Eun. H. Lincoln

D I G E S T^o
OF THE
LAW OF ACTIONS
AT
N I S I P R I U S.

IN TWO VOLUMES.

V O L. I.

By ISAAC 'ESPINASSE, Esq.
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Et Spes et Ratio Studiorum—

JUV.

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TO THE RIGHT HONOURABLE
LLOYD LORD KENYON, *Dan. W. Lincoln*

LORD CHIEF JUSTICE OF THE COURT OF KING'S BENCH,

FROM MOTIVES

OF SINCERE RESPECT AND VENERATION

FOR THOSE DISTINGUISHED AND VALUABLE QUALITIES,

OF GREAT LEGAL KNOWLEDGE, EXTENSIVE ABILITIES,

AND UNWEARIED APPLICATION

IN

THE ADMINISTRATION OF THE JUSTICE OF HIS COUNTRY,

AND

IN DISCHARGE OF THE DUTIES
OF THAT HIGH AND IMPORTANT OFFICE

OF

CHIEF JUSTICE OF ENGLAND,

THE FOLLOWING WORK

IS WITH THE GREATEST DEFERENCE

INSCRIBED.

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

REPORT OF THE

COMMISSIONERS OF THE

BOARD OF EDUCATION

FOR THE YEAR 1900

CHICAGO, ILL.

1901

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GENERAL INTRODUCTION.

ACTIONS at *Nisi Prius* are the different Modes of Redress which the Law has given, where, by the Verdict of a Jury, the Party injured recovers Damages proportioned to the Injuries he has sustained.

These Damages arise either from the Breach of any *Contract* which the Parties have entered into, or from the Commission of some positive *Injury or Wrong* unconnected with any Contract or Agreement whatever.

Actions at *Nisi Prius* are therefore reducible to the two Heads of, Actions founded on Contracts, or on Torts and Wrongs.

Actions founded on Contracts are either on *simple Contracts* as verbal Agreements, Notes, or Contracts unsealed; or on *special Contracts*, as Deeds, Instruments under Seal, Recognizances or Judgments.

These form the Actions of 1st. Assumpsit; 2^{dly}, Debt; 3^{dly}, Covenant.—The first on simple, the two latter on special Contracts.

Actions founded on Torts or Wrongs constitute what are termed Actions of *Trespass*.

Trespass

GENERAL INTRODUCTION.

Trespass is either *vi et armis* or *on the Case*, that is, where the Trespass is *immediately injurious*, and accompanied with some degree of Force or Violence, or where it is unaccompanied with Force, *and in its Consequences only injurious*.

Both Species of Actions may be divided into Actions of Trespass, as they respect 1st, the Person, 2^{dly}, Personal Property, 3^{dly}, Real Property or Chattels real.

Trespass *vi et armis* therefore is divisible into the Actions of 1st, Assault and Battery, 2^{dly}, False Imprisonment, 3^{dly}, Adultery, or Trespass considered with reference to the *Person*, 4^{thly}, Replevin, 5^{thly}, *Trespass*, properly so called, or Trespass with respect to *personal Property*, and 6^{thly}, Ejectment, or Trespass with reference to *real Property*.

Trespass on the Case is in like Manner divisible into 1st, Slander, 2^{dly}, Malicious Prosecution, or Case considered with reference to the Person, 3^{dly}, *Trover*, or Case considered with reference to personal Property, 4^{thly}, Trespass on the Case, properly so called, which takes in Injuries to real Property.

Of each of these I shall proceed to treat in their Order.

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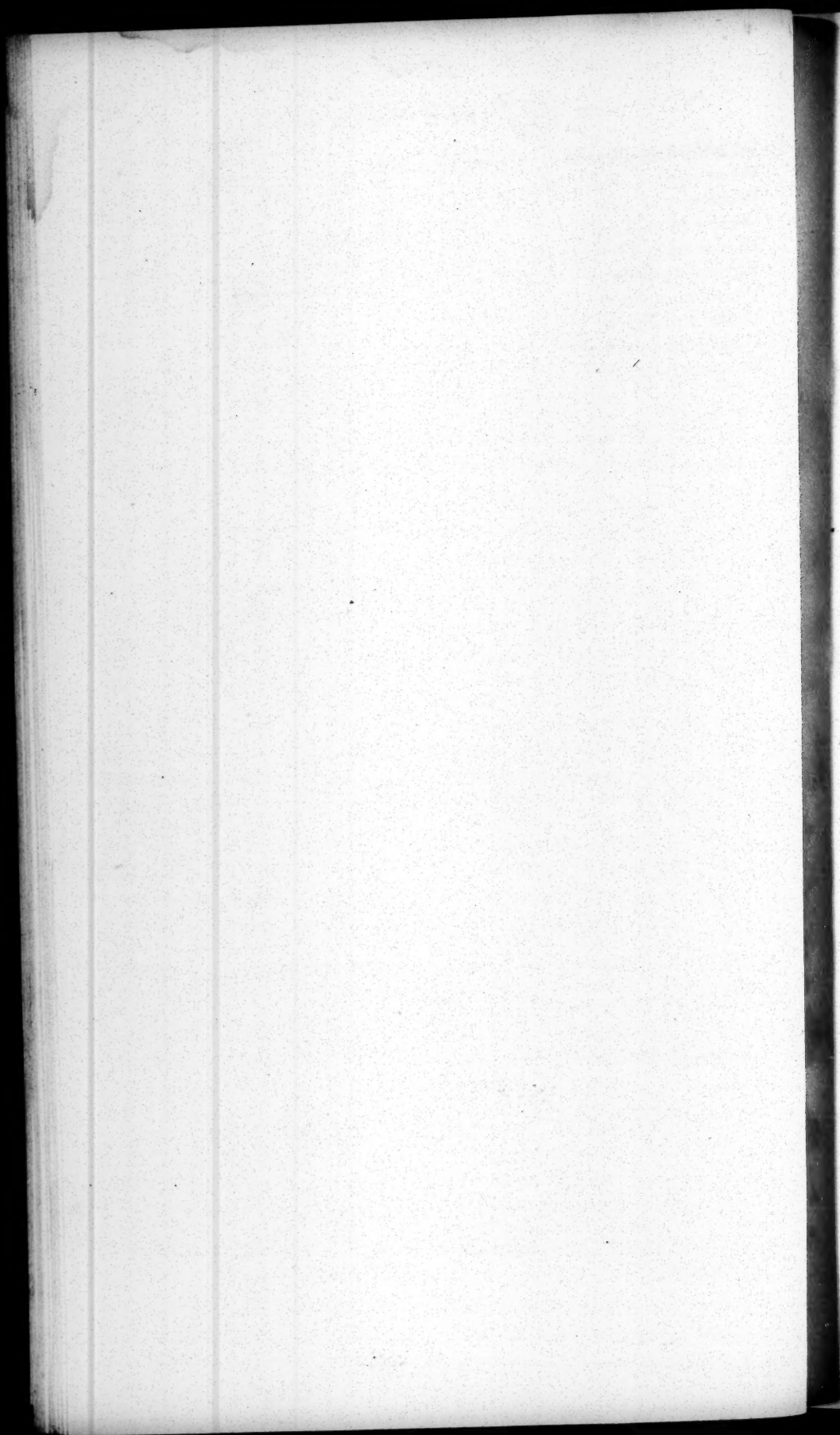
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INTRODUCTION.

IN pursuance of the original division of Actions into those founded on Contracts, or on Torts, I shall in the first place consider Actions founded on Contract.

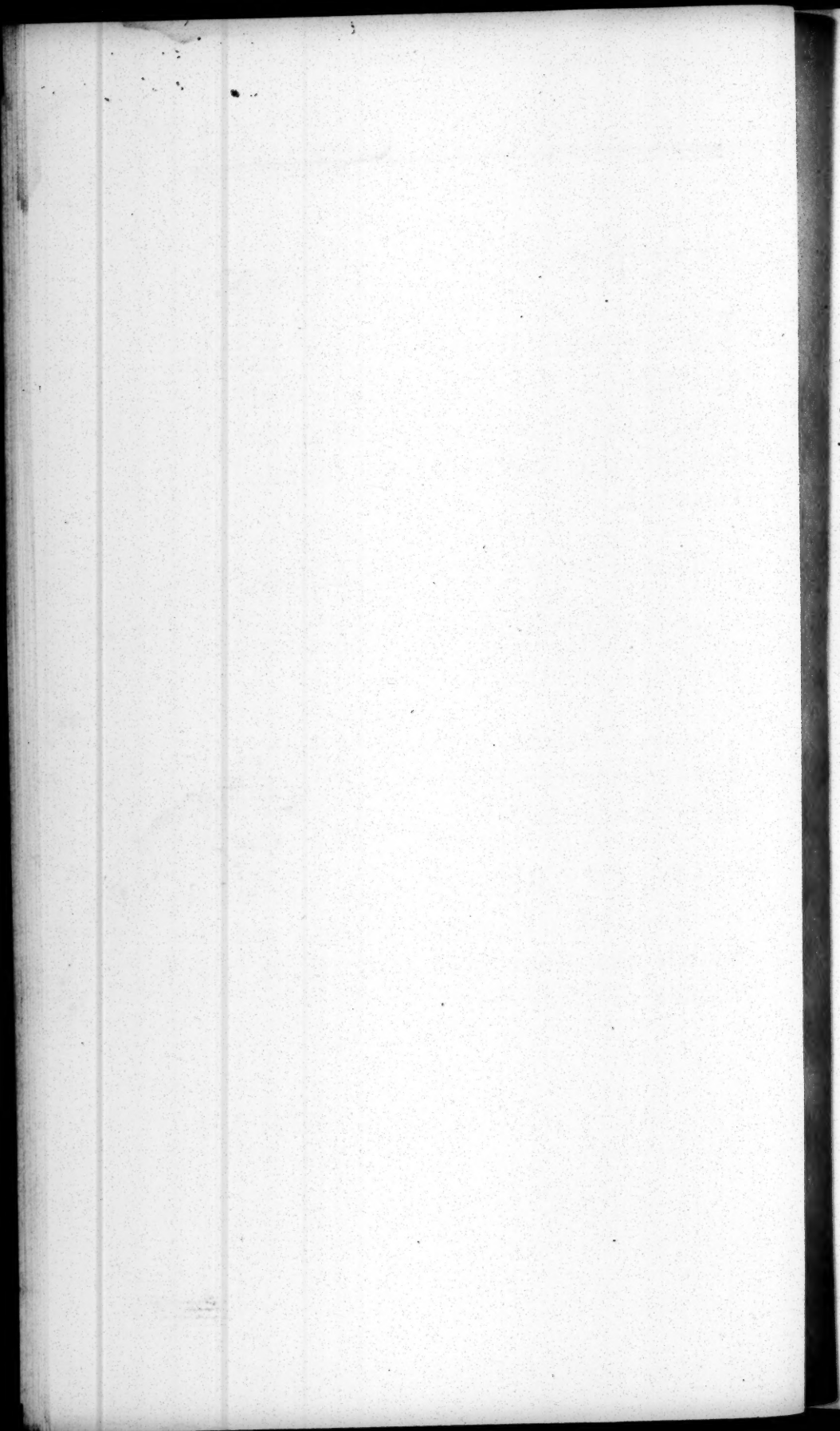
These form the following Actions,

1st, Of Assumpsit, or Actions founded on simple Contract.

2dly, Of Debt, in which Action, Money due under special Contract or Instruments under Seal are recovered.

3dly, Of Covenant, which is founded on special Contract, or Deeds, and in which the sum recovered is in the nature of Damages.

CHAP-



Wm. H. Lincoln
Aug. 7 1806

* CHAPTER I.

* P. I.

THE ACTION OF ASSUMPSIT.

ASSUMPSIT is an action whereby damages are recovered for the breach of any promise, contract, or undertaking.

These contracts are either express or implied: both are equal grounds of this action; for the obligations of natural justice are equally strong as the most express promise in the eye of the law.

Assumpsit is of two sorts: 1st. *Indebitatus assumpsit*, Glade's case, which in its nature is an action of debt, and lies in cases 4 Co. 92. only where debt would lie: 2d. A special *assumpsit*, in which the damages are not in the nature of a debt, but as a compensation for injury; for in *indebitatus assumpsit* the plaintiff Id. 4 Ref. recovers not only damages for the special loss, if any, but 4 Co. 94. b. to the amount of the whole debt; and therefore a recovery in this action would be a good bar to an action of debt brought upon the same contract.

In treating of this action I shall consider it, 1st. On the ground of the contract itself: 2dly, As the contract has reference to the person: 3dly, The pleadings and evidence: 4thly, The verdict and judgment.

* I. OF ASSUMPSIT, CONSIDERED WITH RE- * P. 2.
REFERENCE TO THE CONTRACT.

Under this head may be considered, 1st. On what contracts this action may be maintained: 2dly, On what contracts it cannot be supported. And,

1st. *On what Contracts it may be maintained.*

These contracts are either implied or express.

1. *Of implied Contracts.*

Assumpsit being in its nature an equitable action, it is a Per Lord Mansfield. general description of all cases wherein it lies; that the defendant is obliged by ties of natural equity and justice to 2 Burr. 1012. refund money which he may have received of the plaintiff's, or to pay it, if the plaintiff has a legal right to demand the same. It lies therefore,

" 1st. To recover back money paid under a *mistake*, or *Ibid.*
" through *the deceit* of the other party."

As if an underwriter pay money on an insurance of a ship supposed to be lost, which afterwards arrives safe, he shall recover back the money so paid. 2 Burr. 1010.

A S S U M P S I T.

* P. 3.
Haffer v.
Wallis.
1 Salk. 28.

* So where the plaintiff, being a feme sole, married the defendant *Wallis*, who was in truth married to another woman, he made leases of her land, and received the rents; plaintiff after discovering the deceit brought *indebitatus assumpsit* against him for the rents so received and recovered.

2 Burr.
1012.

" 2d. To recover money paid for a *consideration which happens to fail.*"

Shove v.
Webb.
East. 27 G. 3.
Term. Rep.
732.

As where plaintiff had paid to defendant a sum of money for an annuity, the memorial of which not being duly registered in pursuance of stat. 17 Geo. 3. 26. it was set aside, and made void by the statute; plaintiff, the grantee, was allowed to recover back the money so paid by this action.

Stratton v.
Rastall
East 27 G. 3.
2 Term.
Rep. 360.

But where defendant had joined the person who sold the annuity to the plaintiff merely as a security, but in reality never received any part of the money, though he signed with the other the receipt for the purchase-money, and the annuity was void under the statute, not being registered, it was adjudged that defendant was not liable; for plaintiff had no equity on his side, the defendant having received no part of the purchase money.

Brigg's
case.
Palm. 364.

So where plaintiff paid money to defendant, on defendant's promise to make him a lease of land, and before the lease made defendant was exicted, plaintiff recovered his money by this action, the consideration not having been performed.

* P. 4.
Jacob &
Allen.
1 Salk. 27.

* " 3d. To recover money paid to one acting under or in pursuance of a *void authority.*"

As where *H.* having letters of administration, appointed defendant his attorney to receive money owing to the intestate, who received the same, and paid it over to the administrator: afterwards a will appearing, the letters of administration were called in by citation and repealed, and the executor now brought *assumpsit* against the defendant for the money so received and held well to lie, for the administration was void, and the attorney acted without any authority, and so an implied contract is raised, and the defendant chargeable.

Sir R. New-
digate v.
Davey.
1 Ld Raym.
742.

So where a sum was ordered to be paid by the *High Commission Court* by plaintiff to defendant, plaintiff was afterward allowed to recover it back, because ordered to be paid by a void authority, the action being brought after the Revolution.

2 Burr.
1012

" 4th. To recover money obtained from any one by *extortion, imposition, oppression, or taking an undue advantage of the party's situation.*"

Astley v.
Reynolds.
2 Stra. 915.

As where plaintiff having pawned plate to the defendant for 20*l.* at the end of three years came to redeem it, and tendered 4*l.* being more than the legal interest for that time, the defendant refused to take less than 10*l.*; plaintiff paid the 10*l.* and had his goods, and now brought his action for the surplus above legal interest so extorted from him; and on a case

A S S U M P S I T.

* a case made, the court held the action maintainable for the money so obtained from him against his consent. *Note*, it was in this case objected, 1st. That the plaintiff should not have paid the money, but have brought trover; but this was over-ruled, as the plaintiff might want his plate immediately: 2dly, That *volenti non fit injuria*, he having voluntarily paid his money. But, it was answered, that that only holds where the party has a freedom of exercising his will, which here he had not. * P. 5.

So where plaintiff's brother was a bankrupt, and the Smith v. Bromley. Dongl. 672. was induced by an agent for the defendant, who was a principal creditor, to give him 40l. to sign the bankrupt's certificate, the money so paid for that purpose was allowed to be recovered back in this action, as oppressively and unjustly extorted from the plaintiff.

" 5th. This action lies to recover money *embezzled*, or " which any person has been *defrauded of* by cheating or " otherwise."

As where defendant was nurse to a person on his death-bed, and when he died went off with the money he had about him, the administrator of the person deceased was allowed to recover back the money so embezzled, by this action, as money had and received to the plaintiff's use; and Lord Chief Justice Parker said he would presume a subsequent agreement, and the bringing the action is an admission of such consent to make a contract of it. Whip v. Thomas. Trin. 1 G. I. Bull. N. P. 130.

* " And the owner shall recover the property embezzled, * P. 6. " though not in the hands of the person embezzling it."

As was this case, wherein a clerk to plaintiff had embezzled notes and money of his to a considerable amount, which he had paid away in the insurance of tickets in the lottery to the defendant, which insurance was contrary to stat. 12 Geo. 3. sec. 3. 36. it was held, That as these notes and money were not paid *bonâ fide*, but for an illegal consideration, and their identity could be traced, that the real owner should recover them. Clarke v. Shee & al. Cowp. 197.

" 6th. If money has been recovered in consequence of " any judgment or adjudication, if such was erroneous, and " is reversed, the money shall be recovered back again by " this action; or where the judgment has been in an inferior court, where, from the limits of its jurisdiction, the " merits could not be ascertained."

As where defendant levied money by seizing and selling the plaintiff's goods, under a justice's warrant, founded on a conviction, which conviction was afterwards quashed, it was holden that an action for money had and received then lay for the clear money produced by the sale. Feltham v. Terry. B. R. East. 13 Geo. III. Buller N. P. 131. Quot. Cowp. 419.

A S S U M P S I T.

Moses v. M'Farlane. So where plaintiff had been sued in an inferior court, and had matter of defence, which, if he could have pleaded, would have discharged him, but which, from the nature of the court, he could not do, and so had judgment there * against him, he recovered the amount of such judgment by this action.

* P. 7. These are cases of implied contracts, in which defendant, having obtained possession of plaintiff's property, is compellable by this action to restore it. A similar obligation arises where the law has given a claim against any one; in this action such claim is asserted and recovered.

As in those cases: "1st. If a person becomes a member of any society or company, he thereby agrees to abide by all legal claims arising against him from the bye-laws or local regulations of that society to which he belongs."

Barber Surgeons Company of London v. Pelton. Therefore *indebitatus assumpsit* was held to lie against defendant for 20*l.* being the penalty forfeited by the bye-law of the company for not serving the office of steward in pursuance of such bye-law.

2 Lev. 252. * So was the action held to lie for scavage, it being found to be due in London by custom.

* Mayor of London v. Sory Carth. 92. "2d. And in general the implied consent of every person to abide by any legal decision or adjudication raises an implied contract, which is the foundation of an *assumpsit*."

Bell v. Burrows. C. B. East. 5 G. 3. Bull. N. P. 129. Therefore, where by an act of parliament power was given to commissioners to divide common fields, and to make such regulations and orders as they should think fit, they awarded * that all proprietors of land allotted to them, which had been ploughed or manured since any corn had been reaped, should pay to the person who had manured it four shillings per acre, general *indebitatus assumpsit* was held to lie for it.

* P. 8. So general *indebitatus assumpsit* was held to lie for tolls.

Seward v. Baker. § So for petit customs *indebitatus assumpsit* lies.

Hil. 27 G. 3. T. Rep. 618. "3d. Wherever the law has given to any person certain fees or rewards for his employment or trouble, in this action they are recoverable."

§ Mayor of Exeter v. Trimlett. * As where plaintiff in this action recovered the fees due to him as Usher of the Black Rod.

2 Will. 95. † So the fees on being knighted were recovered against defendant by the ushers and daily waiters to the king.

* Sir William Saunderson v. Bignall. 2 Stra. 747. ‡ So where one was named a commissioner to examine witnesses in a cause out of Chancery, and officiated accordingly, he recovered his fees in this action.

† Duppa v. Gerrard. Salk. 78. In this form of action *Attornies* recover their fees; as to whom it is enacted by stat. 3 J. 1. 7. sec. 1. that every attorney

‡ Stockhold v. Collington. Salk. 330. "shall give to his clients true bills of all the charges of suit * under his own hand, before he can charge his client with payment thereof."

* P. 9.

And

A S S U M P S I T.

And by stat. 2 Geo. 2. 23. f. 22. " No attorney or solicitor shall maintain any action for fees or disbursements till the expiration of one month after he shall have delivered to the party a bill of such fees, &c. written in a common hand and in *English* (except law terms and names of writs) and in words at length, except times and sums, and subscribed with his proper hand."

1st. If an attorney brings an action on his bill, the court will stay proceedings till he has delivered a bill to defendant; for before that, under the statutes, he cannot maintain an action. Barnes 26.
Clarke v. Godfrey.
1 Stra. 633.

2d. If the business has been done in the inferior courts, defendant cannot take advantage of the statute, *that no bill has been delivered*; for the statute is confined to business done in the courts above. Brickwood v. Fanshaw.
Show. 96.

3d. Though the statute is a good plea to an *indebitatus* *s. c.* *assumpsit* generally, yet to a special promise or *in simul computasset* it is no plea. Salk. 86.

4th. The statute does not extend to business done in conveyancing, nor to the executor of an attorney; and it may be given in evidence on the general issue. Bull. N. P. 145.
Milner v. Crowdall.
Show. 338.

5th. The court will not stay proceedings on an attorney's bill, nor refer it to a Master, unless the * business, or at least part of the business, has been done in the court where the action is brought. * P. 10.
Gregg's case.
Salk. 89.

6th. And where an attorney has furnished his bill, and the client does not refer it to a Master to have it taxed, but he drives the attorney to an action, the defendant shall not be admitted before a jury to question the reasonableness of the items contained in the bill. Williams v. Frith.
Doug. 188.

4th. " Wherever the law has imposed any duty upon a person, and given him certain *allowances or charges for it*; he shall recover them in this action."

As where by stat. 22 Car. 2. c. 11. f. 21. it is enacted, " That the rates for cramage and wharfage on the river *Thames* shall be assessed and allowed by his Majesty and Privy Council, and no others, be taken, and obliges wharfingers under a penalty, not to refuse to suffer any goods or merchandise to be landed or shipped at or from such wharf."

Cramage and wharfage may be recovered in *assumpsit*, but the duty must be performed within the statute in order to create a debt, and therefore it is to be paid only for goods *actually landed*, and for which the wharf has been used; not for goods taken from on board the same vessel and carried off in lighters while she lay at the wharf. Stevens v. Costor.
3 Burr. 1408.
1 Black. Rep. 413. S. C.

2. " These are the most material grounds of this action arising from the implication of law: I shall now proceed

A S S U M P S I T.

- * P. 11. " * proceed to such as arise more properly from *express undertakings*."
1st. The first I shall consider are those arising upon

Sales.

This action founded on sales may be either at the suit of the vendor for the price of the thing sold, on the express, or of the vendee to recover back the money he has paid, some defect appearing in the thing sold, or fraud in the vendor on the implied undertaking.

For, 1st. " if a contract is made on a sale, it is always supposed that the vendor has a good title; if therefore there is any concealment of the circumstances affecting the title, and vendee has paid the purchase money, he may wave the bargain and recover back his money."

Borough v.
Skinner.
5 Burr.
2639.

As where defendant, who was an auctioneer, had sold an interest in land, for which the plaintiff had made a deposit of 50*l*. But upon an objection to the title and the want of disclosure of some circumstances, the plaintiff declined going on with the contract, for sufficient reason in the opinion of the court. In consequence of which, plaintiff recovered back the deposit so made.

Flureau v.
Thornhill.
2 Black.
Rep. 1078.

But in such case where the title is not good, the person who had become the purchaser can only recover back his *deposit*, with interest, not * any farther damages for the supposed loss of a good bargain.

* P. 12.

Borough v.
Skinner.
ante.

Note. In this case it did not appear that the auctioneer had paid over the money to his principal. But the court seemed to be of opinion, that the auctioneer should not part with any deposit so made, till such time as the sale should be finished and completed, and it should appear in the event to whom it belonged.

" This was the case where there was no possession delivered to the vendee of the thing purchased. If possession has been given, this action will not lie unless the goods so purchased have been returned, for then the contract is at an end and plaintiff may sue for the money."

Towers v.
Bennett.
Sittings
after Hil.
26 G.3.B.R.

As where plaintiff purchased an horse and chaise, for which he paid nine guineas, and it was agreed at the time of the sale that if the horse did not please the wife of the plaintiff, he should be at liberty within three days to return him. Within the three days he did return him and recovered back his money.

" But where the contract is still open no action will lie."

Weston v.
Downes.
Dougl. 23.

As where plaintiff purchased a pair of horses for seventy guineas from defendant, but which he undertook to take back if returned within a month. The plaintiff did return the first pair within the month but took a second pair, these he also returned

A S S U M P S I T.

* returned and took a third, which he also offered to return ; * P. 13.
but defendant refusing to take them, he brought his action
for money had and received, and held not to lie, the con-
tract being still open.

2d. " So when a purchase is made, if the money is paid ^{Anon.}
" and the thing contracted for is not delivered, vendee may ^{1 Stra. 407.}
" recover back the money so advanced in this action, this
" disaffirming the bargain ; otherwise, when the bargain is ^{2 Black.}
" made, the property of the goods is transferred to the ven- ^{Com. 448.}
" dee and that of the price to the vendor ; and for that he
" may maintain *assumpsit* even before delivery, provided the
" sale has been a good one. As to which those points have
" been settled."

1st. If the vendor takes upon himself the delivery of the ^{Veale v.}
goods purchased, to the vendee he stands all risques ; but if ^{Beale.}
the vendee points out the particular mode of conveyance by ^{Cowp. 295.}
which the goods are to be sent, and vendor sends them ac-
cording to such direction and they miscarry, vendee must
stand at the loss.

2d. By the statute of frauds 29 *Car. 2. c. 5. s. 6.* it is
enacted, " That no contract for the sale of any goods or
" merchandize for the price of 10*l.* or upwards shall be
" good, unless the buyer accept part of the goods sold and
" actually receives the same, or gives something in earnest to
" bind the bargain : or there be some note or memorandum
" in writing of the said bargain made and signed by the par-
" ties or their agents lawfully qualified."

* Under this statute it has been adjudged,

* P. 14.

1st. " That it extends only to cases wherein the seller is ^{Clayton v.}
" to deliver the goods immediately and the buyer immedi- ^{Andrews.}
" ately to pay for them, that is to contracts executed, not ^{4 Burr. 2101.}
" to cases wherein the contract is executory and the buyer is
" to be furnished with the goods in future and then to pay."

As where defendant bespoke a chariot, and when it was ^{Towers v.}
made refused to take it : and on an action brought for the ^{Sir J. Robin-}
price pleaded that there was no earnest or note in writing, and ^{son.}
so that the contract was void under the statute of frauds. But ^{1 Stra. 506.}
it was ruled that the statute did not extend to executory con-
tracts of this nature.

2d. " Goods sold at public auctions are not within this
" statute, that is no earnest or note in writing between the
" parties is required."

For where goods at an auction were knocked down to de- ^{Simon v.}
fendant and his name entered in the auctioneer's book as the ^{Motivos.}
highest bidder ; and he came next day and saw them weighed ; ^{3 Burr.}
but failing to take them away, the auctioneer resold them and ^{1921.}
then brought this action for the price. He pleaded the statute
of frauds, but it was ruled that the auctioneer was to be con-
sidered as agent for the buyer as well as the seller ; and that
as

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as such setting down the name of the buyer, the price, &c. was a sufficient memorandum in writing within the statute.

* P. 15. 3d. It was decided in this case, 1st. That earnest only binds the bargain and gives the party a right to demand ; but a demand without payment of the money is void, for the money must be paid at the taking away of the goods, as no other time for payment is appointed. 2d. That after earnest given, the vendor cannot sell the goods without a default in the vendee ; and therefore if vendee does not come and pay for and take away the goods, the vendor ought to request him to do so ; and if he neglects, the vendor may sell them again in convenient time after.

And whatever sum is paid for earnest, is to be deemed part of the price when the goods come to be paid for.

4th. " But where a deposit has been made, it should seem that if vendee does not perform the bargain he shall forfeit such deposit ; which is the rule in equity."

For where on a sale under a decree, a part of the purchase money was deposited, and vendee afterwards refusing to complete the purchase, the vendor filed his bill to compel the payment of the money and perfect the sale ; the court allowed the defendant (the vendee) to forfeit his deposit and give up all claim to the thing intended to be purchased.

And Note, That when a person sends an article to an auction which advertises to sell to the best bidder, with orders not to have it sold under such a price ; an action will not lie against the auctioneer if he sells it at a price less than that so mentioned, as such dealings are a fraud on buyers ; but it is otherwise had he ordered it *not to be set up* under such a price.

5th. By the same statute 29 Car. 2. it is further enacted, That if the goods are under 10*l.* value, if they are not to be delivered within the year, no contract or sale of them shall be valid, except there shall be a note in writing signed by the parties or their agents."

2d. The next ground of *assumpsit* on express contracts, I shall consider as that arising from

Wagers.

" *Assumpsit* will lie to recover a wager fairly won, and arising on a contingency, the event of which is then unknown to both parties, but it must not be for a blind to an illegal or an immoral transaction, or to conceal simony, usury or bribery ; nor must it be inconsistent with the sound policy of the state to support it."

1st. " It is essential to a fair wager that it is contingent, and the event unknown to the parties at the time of laying the wager ; for if either side have a certainty of winning, the wager is void."

As where the wager in question was between two young men on the longest life of their respective fathers ; in fact,

at

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* at the time when the wager was laid the defendant's father * P. 17.
was dead, he having died the same day on which the wager was made; but at such a distance, that the event could not be known for some days after. Defendant refused to pay on the ground that it was impossible he could win, his father being *then dead when the wager was made*, and so that as he could not win, he was not bound to pay. But it was held that the event being unknown, that it was a fair wager, and plaintiff had judgment.

So where the wager was that a decree of the court of Chancery would be reversed in the Lords on appeal, and the defendant attempted to evade payment. 1st. By asserting that the wager was not fair from the circumstance that the laws are positive and certain, and so the event not contingent. 2dly. As being improper and disgraceful, and so against principle, to suppose that a decision would take place contrary to right, and therefore that the court would not support it. But it was held to be contingent the question being clearly doubtful. 2dly. That it was neither improper nor contrary to principle, and plaintiff recovered.

2d. "The ground of the wager must not be an *immoral* or *indecent transaction*, for such cannot be recovered."

As where the wager was upon the sex of Mademoiselle D'Eon, the action was held not to lie. 1st. Because it affords an open to indecent and improper evidence. 2dly. Because the peace and character of a third person is materially injured by an inquiry in which such person is not concerned, but by the voluntary acts of two uninterested persons is brought into question. Da Costa v. Jones. Cowp. 729.

3d. "Neither must it be a cover to an *illegal transaction*." * P. 18.
As where the wager was between two voters on the event of an election then depending. It was adjudged that the action would not lie. For so it might be made a means of bribery at the election. But had the persons not been voters it might have been otherwise. Allen v. Hearn. Mich. 26 Geo. 3. B.R. Term. Rep. 56.

4th. "And *a fortiori* wherever the wager is itself illegal, or arises from an illegal transaction, it is not recoverable. Such are the cases of wagering policies."

Such also are wagers founded on gaming, which are avoided by stat. 9 Ann. c. 14.

But 1st. Under the statute the wager must arise from *play*. For where the wager was that a person would not run four miles in twenty-one minutes; this was adjudged not to be within the statute; for the person by whose means the wager was won was not *playing*. Lynal v. Longbottom. 2 Will. 36.

2d. "So where the wager was not on the event of the game play'd at, but on a collateral matter."

As where it was on the move of a man at backgammon, not on the play. It was adjudged to be recoverable in this action. Pope v. St.leger. Salk. 344.

And

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- * P. 19. *Bovey v. Castlemain.* 1 Raym. 69. *Hard's case.* Salk. 23. S. P.
- * And *Note*, that to recover a wager *indebitatus assumpsit* will not lie, but a special *assumpsit*. For *indeb. assumpsit* lies only where debt will.
- 3d. " A third ground of this action is that for

Use and Occupation.

" Which is given by stat. 11 G. 2. c. 19. which enacts *ſ.* 14. that where the agreement is not by deed, the landlord may recover a reasonable satisfaction for the tenements occupied by the defendant, in an action on the case for use and occupation; and if in evidence on the trial any parol demise, or any agreement not by deed appears wherein a certain rent has been reserved; the plaintiff may make use thereof as an evidence of the *quantum* of the damages."

Preston v. Merceau. 2 Black. Rep. 1249.

And where there is a note in writing expressing the *quantum* of the rent, no evidence of a parol agreement for the payment of any greater rent than is therein expressed shall be admitted: for this would elude the statute of frauds.

Green v. Harrington. Hutt. 24.

Before this statute, rent was recoverable only by action of debt, for at common law *assumpsit* would not lie for it.

And by *ſ.* 15. same statute, " If any tenant for life dies before or on the day on which any rent was made payable, upon any lease which determined with the life of such tenant for life, his executors or administrators, may * in this action recover against the under-tenants such a rateable part of such rent as would be due to the tenant for life for the time he lived."

* P. 20.

In Chancery, Lord *Hardwicke* decided, that when tenant in tail made a lease for years, and died a week before the rent became due, *without issue*, that his executor was intitled to an apportionment of the rent. For though tenant for life only is mentioned, yet he as to this is as tenant for life. In the same case Lord *Hardwicke* was of opinion, that tenant for years determinable on lives, was within the mischief of the statute. So where a wife had an annuity as a separate maintenance, payable quarterly, and died in the middle of the quarter, the annuity it was held should be apportioned. For annuities come within the meaning of the statute.

Paget v. Gee, *Burn's Jusf.* 471.

Howell v. Hanforth. 2 Black. Rep. 1016.

4th. The next class of express contracts which are the foundation of this action arise on

Bills of Exchange and Promissory Notes.

I shall consider under this head, 1. What bills or notes are of a negotiable nature. 2. In what manner negotiated. 3. The acceptance of bills of exchange. 4. The protest. 5. The nature of payments by bills or notes.

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* 1. Of what Bills or Notes are of a negotiable * P. 21. Nature.

Bills of exchange drawn in the usual form, of being "payable to A. B. or order," were at all times negotiable by the custom of merchants; but promissory notes were first made so by stat. 3 & 4 Ann. c. 9. §. 1. which enacts, "That all notes signed by any person promising to pay to any other person, or order or bearer, the money mentioned in such note, shall be assignable over by indorsement as bills of exchange are; and the indorsee may maintain his action on such indorsement." And

1st. It is sufficient if the note is drawn so, "I A. B. promise to pay, &c." without being subscribed A. B. though the words of the statute are signed by such person. Taylor v. Dobbins. 1 Stra. 402.

And signing by, making his mark, is a sufficient signing within the statute. Elliot v. Cooper. 1 Stra. 609.

2d. "No promissory notes are negotiable, but such as are for the payment of money absolutely. For if they depend on a contingency, they are not negotiable." -

1. Therefore a promise to pay l. after defendant's marriage, is not a negotiable note, for defendant may never marry, and so the note is contingent. Beardley v. Baldwin. 2 Stra. 1151.

2d. Therefore notes in the alternative are not negotiable, as a note promising to pay or * deliver an horse, or to pay if J. S. does not, are not negotiable notes; for the note becomes a nullity by performance of the other part of the alternative. Smith v. Boheme. 2 Ld. Raym. 1596. * P. 22.

3d. "So the note must be for the payment of money." As a promissory note to pay 300l. to B. or order, in three good East India Bonds, is not a negotiable note within the statute. Moor v. Vanlute. E. 1 G. 1. C. B. Buller N. P.

4th. "But where notes are to become payable on an event which will certainly happen and take effect in future; they are then negotiable." As where the note was for the payment of money six weeks after the death of defendant's father: it was held a good negotiable note, for the event is certain. 272. Cooke v. Coleham. 2 Stra. 1217.

But a note in these words "I promise to pay l. on the death of George Henshaw, if he leave me so much, or I am otherwise able, was held not to be negotiable." For it is uncertain whether G. Henshaw will leave him so much, or that he will be able. Roberts v. Peak. 1 Burr. 323.

"And so a note at first contingent may, by subsequent words, become positive and negotiable;" as, if a note was drawn by an infant promising to pay "when he comes of age," that would not be negotiable, on account of the uncertainty of the event; but when it is added, "on his coming of age" Gos v. Nel-son. 1 Burr. 226.

viz.

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viz. "12th June 1750." there the time is specified and it becomes a certain debt, *solvendum in futuro*.

- * P. 23. * 5th. "For the *uncertainty of the time when the note comes payable*, does not destroy its negotiable nature; for "such is the case of all notes payable at some time after sight, "as they are first to be tendered; so in the cases now quoted, "and in those of the same nature."

Evans v. Underwood. 1 Wils 262. As where it was to pay *on the receipt of wages on the paying off a ship of the navy*, such was held a negotiable note. *Andrews v. Franklin*. 1 Stra. 24. S. P. for the paying off of the ship is certain.

6th. "No express form of words is necessary to constitute a good and negotiable note, provided it amounts to an "absolute promise to pay."

Morris v. Lee. 1 Str. 629. As a note promising *to be accountable to J. S. or order*, or for the debt of another (1 Stra. 264.) is negotiable.

Chadwick v. Allen. 1 Stra. 706. So *acknowledging to have received* certain notes, and to be *indebted* in the balance, which the maker of the note promises to pay, is a good and negotiable note.

3d. So also *bills of exchange* must be for the payment of money absolutely in order to be negotiable. As

Jenny v. Herie. 1 Stra. 591. 1st. Where the bill of exchange was drawn, on the monies in drawee's hands belonging to the proprietors of the *Devonshire mines*, being part of the consideration for the purchase of the manor of *West Buckland*. "This was held

* P. 24. "not a negotiable bill of exchange: for * it is *charged out of a particular fund* which may not answer, and so the bill is "not payable at all events."

Dawkes v. Ld. Deloraine. 3 Wils 208. So where the note was "*to pay out of William Stewart's money as soon as received*." This was adjudged not to be a negotiable bill of exchange, on account of the uncertainty of the fund on which it is drawn.

Jocelyn v. Laferre. 2 Stra. 591. So where the bill was drawn by an officer, *on his growing subsistence*. It was adjudged not negotiable for the same reason.

2d. "But where a particular fund is mentioned, *if that is one that will certainly answer*, the bill is negotiable "which is drawn on its credit."

McLeod v. Sme. 2 Stra. 763. As where it was drawn by an officer "*on his quarterly half pay*, to be due from the 24th of *June to the 24th of September*, by advance;" this was held a good bill of exchange: for the half-pay is a certain fund, and it is only a direction to the drawee out of what fund he is to be reimbursed, but the money is advanced on the credit of the person.

3d. But, "a bill of exchange negotiable at first, may by "the indorsement be restrained from being further negotiable."

Archer v. Bank of England. Doug. 615. As where the bill was drawn in the usual form of negotiable bills, *payable to one Messue or order, &c.* he sent it to the drawee with this indorsement; "*the within bill must be "credited*

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" * credited to the account of Dahl," Dahl being indebted at that time to the drawees. This indorsement was adjudged to restrain the bill from being negotiable, though drawn in that shape at first, by limiting it to be appropriated to a particular purpose. * P. 25.

4th. So a bill of exchange payable to a person only by name, without the words *or order*, is not a negotiable bill. 3 Will. 211.

4th. " These are the cases which have occurred and been decided on the particular natures of promissory notes and bills of exchange : but there are certain cases common to both, in which *neither are negotiable* : that is which are founded on particular circumstances which operate to avoid all notes or bills of exchange whatever."

As 1st. Where a woman *during coverture*, gave a note of hand for a sum of money. It was adjudged void ; and though in this case *after her husband's death she promised to pay it*, it was held not to establish the note, which was void in its creation. Lloyd v. Lee. 1 Stra. 94.

2d. So where a bill of exchange was given on an *usurious contract*, viz. for 200*l.* for goods of the value of 117*l.* the rest of the sum being on an usurious consideration. This bill of exchange, though indorsed over for a valuable consideration, was held to be void in the hands of the indorsee : for it was void *ab initio* on account of the usury. Lowe v. Waller. Dougl. 708.

* 3d. So where a promissory note was given, *for money lent* to the defendant *knowingly to game with*, by one Church, who indorsed it over to plaintiff for a valuable consideration, it was held that stat. 9 Ann. 14. having declared " all notes, whereof the whole, or any part of the consideration, was money knowingly lent to game with, to be void to all intents and purposes whatever ;" and this note being of that description, it could never be recovered in any hands whatever. * P. 26.

Note, it is necessary to attend to what notes are negotiable, and what not ; for if plaintiff declares on a note of hand under statute 3. 4. Ann. 9. and has judgment, and it afterward appears that the note was not negotiable, judgment will be arrested. Smith v. Boehm. Gilb. Rep. 93.

2. In what Manner Bills of Exchange or promissory Notes are negotiable.

This is either by, or without indorsement. And

1st. When a promissory note or bill of exchange is of a negotiable nature, it then only can be indorsed over to a third person, we shall therefore consider the decided cases under the head of

Indorsement.

This head may be divided into, 1st. Who may indorse : 2d. In what manner an indorsement should be made : 3d. * P. 27. the effect of the indorsement.

1. Who

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I. *Who may indorse.*

1st. The payee of a bill of exchange, or the person to whom the note is payable, must, from the nature of the transaction, be the first indorser.

Connor v.
Martyn.
1 Stra. 516.
3 Will. 5.

2d. If a note is made to a *feme covert*, she cannot indorse it; for the right is vested in the husband, and *he alone can indorse it*. So if it was made to her when sole, it is the same; if she afterwards marries, the *husband must indorse the note*. For being personal property it belongs exclusively to the husband.

Rawlin-
son v. Stone.
3 Will. 1.
2 Stra. 1260.
S. C.

3d. "So by the custom of merchants, *an executor or administrator may indorse over a note or bill of exchange*, for the whole property is in *them*; and the note or bill is in its nature assignable."

King v.
Thorn.
Mic. 27 G. 3.
B. R.
Term. Rep.
487.

So a bill of exchange may be indorsed to an executor or administrator as such, and be sued for by such executor or administrator: as in payment of a debt due to the estate of testator or intestate.

2. *In what Manner the Indorsement is to be made.*

1st. By stat. 17 G. 3. c. 30. "All notes of hand, inland bills of exchange, or undertakings, under 5l. being negotiable, must be signed or * attested by one witness; and also the name and address of the person to whom it is payable be inserted; and every indorsement must say, "Pay the contents to *A. B.* or order, or such note is void."

* P. 28.

2d. "The usual mode of indorsing a note or bill is by these words, *Pay the contents to A. B.* and signed by the payee. And such indorsement transfers the property to *A. B.* So also may a bill or note be indorsed by a *blank indorsement of the name alone*; but there must be some evidence that is taken by the indorsee as property: for the mere indorsement of the name does not *of itself* transfer the property in the bill or note."

Clark v.
Pigot.
1 Salk. 126.

As where plaintiff having a bill of exchange payable to him or order on defendant, sent it to his friend *J. S.* to get it accepted, having first put his name on it. *J. S.* got it accepted: but it not being paid, plaintiff brought his action against the defendant; and it was contended that it would not lie, the property being transferred to *J. S.* But *Holt Ch. J.* held, that *J. S.* had it in his power to act either as indorsee of the bill, by writing to that effect above plaintiff's name, or as his servant by writing an acquittance to defendant above it in like manner: that not having written an indorsement above, he took the note to receive the money as servant to plaintiff, and so the action well lay.

Lucas v.
Haynes.
Salk. 130.
S. P.

And therefore where in the action by the payee, the note being produced, had his name * on the back of it; and it was insisted,

* P. 29.

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insisted, that that was an indorsement. The judge allowed Theed v. Lovell. 2 Stra. 1103.
it to be struck out in court, for being in blank, no property was transferred.

3. A bill of exchange cannot be indorsed over *for a part of the sum it is drawn for*, for that would subject the drawer or acceptor to several actions, upon a contract which is entire. But the holder may have his action for part, if he acknowledge satisfaction for the rest. Hawkins v. Cardy. 1 Ld. Raym. 360. Salk 65. S.C.

Therefore though the indorsee has received part of the money from the indorser of a bill of exchange, he may, nevertheless, have his action against the drawer of the bill for the whole amount of the bill, and the indorser have his remedy, for so much as he has paid, against the indorsee; for if the action was brought by the indorsee only for the residue, the indorser who paid him would have his action against the drawer for the part he had paid, and so multiply actions. Johnson v. Kenyon. 2 Will. 262.

3d. We are to consider *the nature and effect of the indorsement*.

1st. "The indorsement always follows the nature of the bill or note so indorsed."

As where the bill was payable *to Campbell or order*, and indorsed by him to *Ogilby*, omitting the words *or order*: it was adjudged, that the note was further negotiable, though these words were wanting, for that the indorsement followed the nature of the original bill, which was * negotiable; "and the case is the same of promissory notes." Edie v. East India Company. 2 Burr 1216. 1 Black. Rep. 295. S. C. * P. 30.

For where the plaintiff declared on a note indorsed *to him or order*, and on producing the note, the words *or order* in the indorsement were wanting, it was adjudged no variance, for the note being drawn originally payable in that form, the want of those words in the indorsement did not alter its nature, but it remained negotiable in the same form still. Acheson v. Fountain. 1 Stra. 557. More v. Manning. Com. 312.

2d. "An indorsement to a person's order, is an indorsement to the person himself."

For where a bill of exchange was indorsed thus, by the payee, "pay the contents *to the order of Mr. Fisher*," and he brought his action as indorsee, to which there was a demurrer, the indorsement not being *to himself in person*: but was over-ruled, as this is the usual form among merchants. Fisher v. Pomfrett. Carth. 402.

3d. But the indorser of a bill of exchange may charge himself with terms different from the tenor of the bill, for he may be declared against as assuming to pay according to the terms of the *indorsement*, which could be bad as against the drawer: as if a bill be payable *first of May*, he can indorse it as payable *the first of April*, and he is chargeable by such indorsement. Smallwood v. Vernon. 1 Stra. 478.

4th. If a person puts his name on the back of a blank piece of paper, which is to be afterwards filled up into the tenor of a note or bill, the person so putting his name shall be liable. Russell v. Longstaffe. Dougl. 496.

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* P. 31. * be bound as an indorser of such note or bill when made to the amount of it: for the indorsement on such a blank piece of paper is a letter of credit to an indefinite sum.

5th. A distinction is to be observed in the case of notes and bills of exchange in what manner and order the several parties are chargeable, after indorsement.

2 Burr. 674. 1st. In bills of exchange, the acceptor is first liable, for he is charged by the acceptance, and the drawer only comes in aid of his default. Wherever therefore a bill of exchange is indorsed, the indorsee must *first apply to the acceptor*. On default of the acceptor, then recourse is to be had to the drawer, but in the case of an indorsement, every indorser is as to his subsequent indorsee a new drawer, and may be sued on default made by the acceptor.

Rushton v. In every action therefore by an indorsee against an indorser or drawer of a bill of exchange, *he must set out a demand first made on the acceptor*, and a default by him; and 2dly. *notice to this effect* to the indorser, or it is error.

Bromley v. 2d. But the indorsee of a bill of exchange, on default of the acceptor, may sue the indorser, and is not obliged to shew any demand on the *drawer*, either in the case of an inland or foreign bill of exchange; for the indorsee may not know where he is to be found, and every indorser is as to him a drawer.

3 Burr. 669. * 3d. The law of promissory notes is in strict analogy to this.

* P. 32. Promissory notes assume the shape of bills of exchange only 2 Burr. 674. *where indorsed*, for then the maker of the note is the first liable, and is as the acceptor of a bill of exchange, the indorsee as the payee, and the indorser as the drawer.

Synderbot- The obvious result therefore of this is, that according to tom v. the rule above, the indorsee must first make his demand Smith. against the *maker of the note*, and on his default, only have Harry v. recourse to the indorser.

Perrit. * Therefore in an action by the indorsee against the indorser, he must prove notice to the indorser of the maker's Salk. 133. default: but proof that the maker could not be found will excuse such notice, unless indorser shews that the maker S. P. could be found.

Truby v. " And indorsee must shew therefore, that he used due De La Fountaine. diligence to make the demand from the maker of the M. 2 G. 2. note." per Rayn. Bull. N. P. 273.

Collins v. For where indorsee proved that the maker of the note Butler. which was due 27th of *December*, had in the *November* before, 25tra. 1187. shut up house and gone away, this was held not of itself sufficient to make a demand unnecessary, but that indorsee should have made further enquiries.

Vaughan v. " But the indorser may supersede the necessity of such a Fuller. demand by his own act, as if he pays part of the note; for 25tra. 1246. " that discharges the maker totally, and subjects himself " with

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" * with the whole, and in such case a demand from the * P. 33.
" maker of the note was held to be unnecessary."

6th. " As every indorser is therefore as a drawer in re- Lambert v.
spect to the indorsee, if the action is brought by the indorsee Pack.
against the indorser, he is never called on to prove the hand- Salk. 127.
writing of the drawer. For the indorser is liable on his own
indorsement though the bill was forged."

But if the indorsee brings an action *against the acceptor* of a Smith v.
bill of exchange, he must prove the hand-writing of the first Chester.
indorser, even though there were several indorsements on it E. 27 G. 3.
when accepted, for a bill of exchange is no payment to the B. R.
person in whose favour it is drawn, unless it has been indorsed Term. Rep.
by him. 654.

7th. If an action is brought on a promissory note *against the* Guichard v.
maker by the person to whom it is made payable, the defendant Roberts.
will be admitted to impeach the promise, and go into the con- 1 Blackst.
sideration : as to shew it was illegal, as here, on a smuggling Rep. 445. +
consideration ; or to shew that it was delivered as an escrow ; Jeffries v.
ex. gr. as a reward for procuring defendant to be restored to Aulten.
an office, which the plaintiff had not effected, and so the con- 1 Stra. 674..
dition was not performed : in which case plaintiff cannot re- * P. 34.
cover. But when the action is *not between the parties them-* Snelling v.
selves, as where it is *by the indorsee*, the consideration of the Briggs at
note shall not be disputed, but the indorser be bound. * There- Reading,
fore where the action was against the indorser, Lord Raymond 1741.
would not suffer him to give in evidence, that the plaintiff de- Bull. N. P.
sired him to indorse the note, to enable him to bring an action 274.
against the drawer of the note, and had promised that he would Collett v.
not sue him. Griffith H.
2 G. 2.
G. Hall.

* And so in the case of bills of exchange, *after indorsement*, Buller N. P.
the acceptor shall not be allowed to question the bill as forged, 274.
for he is bound by his acceptance, even though the bill was * Jennys v.
forged, from the credit it receives from the indorsee, by rea- Fowler,
son of the acceptance. And therefore where two bills of ex- 2 Stra. 946.
change were actually forged on plaintiff, and defendant took Per Buller. J.
them as indorsee *bona fide*, and the plaintiff had paid the Term. Rep.
money ; it was adjudged that he could not recover it back 615.
from the fair indorsee. Price v.
Neale 3.

* 8th. " The holder of an indorsed bill of exchange has a Burr. 1354.
" charge against all the indorsers, and may sue them one after 1 Blackst.
" the other till he is satisfied his whole demand." And Rep. 390.
therefore where in this case, indorsee had a judgment on the S. C.
bill against one indorser, and took him in execution, but af- * Hayling
terwards let him out, on a letter of licence ; it was adjudged v. Mullhall.
that he might notwithstanding resort to all the other indorsers. 2 Black.
For this was not an execution which discharged the whole Rep. 1235.
debt, the defendant being suffered to go at large.

9thly. This is the case of an accepted bill of exchange ;
but if the bill has not been accepted, indorsee has the like re-
C medy

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medy against the indorser, or against the drawer, at his election.

* P. 35. * Therefore where a bill of exchange was indorsed blank, Peacock v. but was never accepted, and was stolen and negotiated with Rhodes. the plaintiff for valuable consideration; being indorsed to him, Dougl. 611. he recovered the value of the note against the defendant, who was the drawer of the bill.

2. Of Bills of Exchange, or Notes negotiable without Indorsement.

3 Burr. This is the case of all notes payable to *bearer* or to *J. S.*
1521. and *bearer*, which from their nature require no indorsement:
Hinton's but the person who comes fairly by such bill or note, may
case. bring an action on it in his own name. But where the action
2 Show. is so brought by the *bearer* in his own name; it is incumbent
235. on him to prove, that he gave for it a fair and valuable consideration.

“ And it matters not how the person who possessed it, came
“ to possession of the bill or note, provided the holder who
“ brings the action gave for it a good consideration, and
“ came by it in the fair course of trade.”

Miller v. For where the mail was robbed and a bank of *England* note
Race. taken out, which was passed by the highwayman to the plain-
1 Burr. 452. tiff, who was an innkeeper, in the course of his business;
this was adjudged to give a full and indefeasible property in
the note to the innkeeper.

* P. 36. In the like manner where defendant gave to one *Bicknell*,
Grant. v. who was his ship's husband, an order * on his banker in those
Vaughan. words, “ Pay to the ship *Fortune* or *bearer* 70*l.* *Bicknell*
3 Burr. lost the note. The person who found it passed it to the plain-
1516. tiff in payment of money for goods *bona fide* sold, and
1 Black. the plaintiff recovered in this action the amount of the
Rep. 485. bill.

S. C. These decisions are founded on the consideration due to
1 Black. bills of exchange and promissory notes as the medium of busi-
Rep. 485. ness, whose circulation is not to be impeded. And therefore
S. C. a bill if lost and found by any person gives him no property
Anon. *against the owner*, though it does against all other persons, and
Salk. 126. the owner may have trover for the bill in the finder's hands,
but when it once becomes fairly transferred in the course of
trade, the owner's property is from that time at an end.

3dly. We have hitherto considered those matters in which
promissory notes and bills of exchange agree, *viz.* that nego-
tiability which is common to both. We shall now consider
those points wherein they differ; that is the *acceptance and*
protest of bills of exchange; no such transactions taking place
in the case of promissory notes. And

1st. *Of the acceptance of bills of exchange*; under which I
shall consider, 1st. What shall amount to an acceptance. 2d.

Of

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Of the manner of acceptance. 3dly. Of the effect of an acceptance, and how it may be discharged.

* 1. What shall amount to an Acceptance.

* P. 37.

1. A verbal acceptance of a bill of exchange shall be sufficient to charge the acceptor. Lumley v. Palmer.

But note, that if the acceptor does not pay, in which case the payee must resort to the drawer, the acceptance must be in writing, in order to charge the drawer with costs and damages, if the bill is an inland bill of exchange (by stat. 3 & 4 Ann. c. 9.) and if a foreign, by stat. 9 & 10 W. 3. c. 17. 2 Stra. 1000.

2d. But the mere answer of a merchant, "that he would honour the bill," is no acceptance except accompanied with other circumstances, which may induce a third person to take it by indorsement. Per Lord Mansfield. Cowp. 573.

As where other words are added to these, they may amount to an acceptance. As where a merchant by letter says, "Your bill shall be duly honoured and placed to your debit." This was adjudged to be a sufficient acceptance. Per Lord Hardwicke. 1 Atk. 612.

3d. "The acceptance must be an absolute undertaking. For if a conditional one, it only charges when the condition is performed."

And whether an acceptance is absolute or conditional is a matter of law and not of fact. And the payee must at the time of tendering it, *take it in one light or other, and abide by such election. For if he conceives the acceptance to be conditional, and so notes the bill for non-acceptance, it is shewing that he considered the bill not as absolutely accepted; and in such case he cannot afterward sue drawee as acceptor. Sproat v. Mathews. E. 26 Geo. 3. B. R. Term Rep. 182.

* P. 38.

4th. In questions therefore between the payee or indorsee, and acceptor, the matter often turns upon what is an absolute and what a conditional acceptance. As to which it has been decided,

1. "Where the acceptance is made with reference to some fund, which is to provide for payment of the bill, it is a conditional acceptance."

As where the drawees of a bill of exchange received a navy bill payable to themselves, as a counter security for the payment of the bill drawn on them, and on the bill being tendered for acceptance, they said, "that they could not accept the bill of exchange till the navy bill was paid." This was held to be a conditional acceptance, and when the money was received on the navy bill, to become absolute against the acceptor. Pierfon v. Dunlop. Cowp. 575.

So where defendant accepted a bill of exchange to pay it when goods consigned to him, and for which the bill was drawn were sold, it was held to be a good acceptance. Smith v. Abbot. 2 Stra. 1152.

2d. "So where it is made with reference to any account between the parties."

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* P. 39. * As where a merchant says, "Leave the bill with me and
 Molloy I will look over the accounts between the drawer and me,
 De Jur. call to-morrow, and accordingly the bill shall be accepted;"
 Mar. 280. this is no acceptance, because it refers to a balance of ac-
 count.

5th. "Wherever the drawee gives a credit to the bill by
 "any act whatever, that shall be deemed an accep-
 "tance."

Moor v. As where a bill was drawn by one *Newton* on *Withy* (the
 Withy. defendant) in favour of *Scot* who indorsed it to plaintiff. He
 Trin. tendered it for acceptance to defendant, who underwrote thus,
 10 G. 3. "Mr. *Jackson*, please to pay this note and charge it to Mr.
 Bull. N.P. *Newton's* account, *R. Withy*." It was insisted that this was
 270. no acceptance, for the defendant did not mean to become the
 principal debtor, it was only a direction to *Jackson* to pay out
 of a particular fund. But per *Curiam*, the underwriting is an
 acceptance, and the mode of payment is a transaction between
 them two only.

Wilkin- So where defendant on whom the bills were drawn, in a
 son v. Lut- letter said, "I will pay the bills in case the owners of the
 widge. ship *Queen Ann* do not; I think it necessary to acquaint them,
 1 Stra. 648 but rest satisfied of the payment." This was held to be a good
 and sufficient acceptance.

And this in effect is an *implied acceptance* sufficient to charge
 the drawee.

* P. 40. * As where a person received a bill, kept it for six days
 Powell v. and entered on it No. 84. 5 May; this was adjudged a
 Monier. sufficient acceptance, tho' there was no express undertaking
 1 Atk 611. to pay.

Smith v. But where a request was made to defendant to accept a
 Nissen. bill, and to secure himself by drawing a bill to the amount of
 Trin. the first on a third person, it was held that the mere act of
 26 Geo. 3. re-drawing such bill did not amount to an acceptance.
 B.R. Term.
 Rep. 269.

2. Of the Manner of Acceptance.

Molloy. 1st. "No person (as wife or servant) can accept a bill of
 282. "exchange so as to bind the master without lawful authority
 "as a letter of attorney or the like, *unless such person has*
 "*usually done so in the absence of the master.*"

Thomas v. Therefore where a bill of exchange was drawn on defend-
 Bishop. ant as *cashier* of the *York-buildings* Company, which he ac-
 2 Stra. 915. cepted generally, he was held to be personally liable. For
 where a bill of exchange is drawn on the master, and the ser-
 vant accepts it, the master may be liable; but where it is
 drawn on the servant himself, though intended to be placed to
 the master's account, yet if the servant accepts it generally
 he alone is liable. "And nothing out of the bill (as the
 "letter

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letter of advice) shall be admitted in evidence as to the person upon it was intended to be drawn."

* 2d. Where there are two joint traders and one accepts a bill drawn on both for himself and partner, it binds both if it concerns the trade: otherwise if it concerns the acceptor only in a distinct interest and respect. * P. 41. Pinkney v. Hall. Salk. 126.

3d. Drawee of a bill of exchange may accept it as to part, or he may accept it to pay half money and half goods, or when goods of the drawer are sold; but payee may refuse such a partial acceptance and protest the bill. That is if the bill is accepted in part, there must be a protest, if not for the whole sum, at least for the part unpaid. After payment there must be a protest of the residue. Wigersloff v. Keene. 1 Stra. 214. Smith v. Scar. E. 14. G. 2. Buller N.P. 271.

4th. "The acceptance of a bill need not be upon the bill itself; it may be by a collateral agreement, and made before the bill has existence; as an agreement to accept; and it shall bind." Molloy 281.

As where plaintiffs who were mere merchants in Holland, agreed to pay a bill of one White's on them from Dublin, on condition that White would give them a credit on some house in London to the amount of the bill. White named defendants, and the plaintiffs having written to them to know if they would accept a bill on them on White's account, they agreed to do it; it was adjudged that this was a sufficient agreement to accept, and bound defendants to the payment of plaintiff's bill so drawn, they having previously accepted and paid the bill drawn on them by White. Pillans and Rose v. Vanmierop and Hopkings, 3 Burr. 1663.

* "But where there is such a previous agreement to accept, if it is conditional in any respect, those conditions must be strictly performed, or the agreement shall not be deemed an acceptance." * P. 42.

As where a partner of an house in London being then at Dominica, wrote to defendant, his partner in London, to accept the bills of an house in Dominica, on their sending him tobacco at 8cl. per hogthead, and ordering an insurance. It was held, that this did not bind the partner absolutely to accept; for it was conditional. That tobacco be consigned, that it is of such a value, and that an insurance be made. If any of these fail, there is no binding agreement to accept, and so to charge the drawee; and here in fact, the tobacco's only producing 4cl. per hogthead, the defendant was held not to be liable. Mason v. Hunt. Dougl. 284.

5th. A bill may be accepted after the time of payment is elapsed, and the acceptor shall be liable. For the substance of the promise is to pay the money, which is done by the acceptance. Milford v. Wallicot. Salk. 129.

So a bill may be accepted to be made payable at a longer time than that on which it is drawn payable, and this shall bind the acceptor. Molloy 283.

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* P. 43. * 3d. *Of the Effect of an Acceptance, and how it may be discharged.*

In case of
Pillans and
Rose v. Vanmierop
& al'. 3 Burr.1663. 1st. " By the acceptance of a bill of exchange acceptor makes himself so absolutely liable, that he can never aver the want of consideration or of goods in his hands being long to the drawer: for the law of merchants knows " no *nudum pactum*."

Wilkinson v. Lutwidge, 1 Stra.648. So where the action is against the acceptor by the payee, he is not obliged to prove the drawer's hand, for by the acceptance the acceptor has acknowledged the hand of the drawer as his correspondent. But the acceptor is not precluded from proving it not to be the hand of his correspondent.

Maber v. Massias, 2 Blackst. Rep.1072. And therefore where there are dealings and an account current between the drawer and drawee as his factor, and a balance in fact due to the drawee, if he accepts a bill of the drawer's drawn on the goods in his hands, this shall only be postponed to *prior acceptances*, and he shall not be allowed to hold the goods for his own balance, for if he meant to have reserved his own balance, he should have made a *special acceptance*.

Symonds v. Parminster, 1 Willf.185. 2d. *An acceptance is an acknowledgment of debt to the drawer*, and therefore where drawee of a bill of exchange accepted it, he was held liable to the *drawer*, he not having paid the bill when due, which was returned protested, and paid by the drawer. But it seems that he might have accepted it for *the honour of the drawer*; in which case he would not be liable.

* P. 44. * 2d. *As to how discharged.*

Burrows v. Jemino, 2 Stra.733. 1st. " The laws of the country where the bill of exchange is accepted, shall determine how far the acceptance binds. Therefore where a bill was accepted at *Leghorn* by the plaintiff, and by the laws of that place, if a bill is accepted, and the drawer fails and acceptor has not sufficient goods of his in his hands, he shall be discharged from his acceptance which here was the case. It was held in Chancery on a bill for an injunction (plaintiff being sued at law in *England* on his acceptance) that the acceptance being declared void by the laws of that place, was void every where, and acceptor discharged.

Mason v. Hunt, Dougl. 284. 2 Ref. 2d. Where drawee of a bill of exchange enters into an agreement to accept on certain conditions, as in consideration that goods of a certain value shall be consigned to him, which is a virtual acceptance, if the condition is performed. before he has absolutely accepted the bills, the payee takes the goods himself and sells them, it is a discharge to drawee of such virtual acceptance.

Molloy 281. And note, that when a person has accepted a bill of exchange, he ought not to pay it till it becomes due; because

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ill that time it is subject to a countermand by the drawer, and therefore if a countermand comes after drawee has paid the bills, the drawer is not answerable.

* 4th. *Of the Protest of Bills of Exchange.* * P. 45.

Bills of exchange are to be protested either for *non-acceptance* where tendered, or for *non-payment* when due.

In the case of *foreign bills of exchange*, protests were by Barnaby v. Rigalt. the custom of merchants at all times in use. Cro. Car.

In the case of *inland bills of exchange*, the first protest allowed was for *non-payment*, and was given by statute 9 & 10 W. 3. c. 17. it enacted, "That inland bills of exchange for 5*l.* or upwards (in which should be expressed that they were for value received) *which should be accepted in writing, if not paid within three days, might and should be protested.*" Salk. 131.

This statute in order to entitle the holder of the bill to make a protest requires, that the acceptance shall be *in writing*. It therefore often happened that the acceptor would accept verbally, but not in writing, so that no protest could be made. To remedy this the first protest of inland bills of exchange for *non-acceptance* was introduced by stat. 3 & 4 Ann. c. 9. which enacted, "That if on presenting an inland bill of exchange, the person on whom it is drawn refused to accept it *in writing*, the holder of the bill should protest it for *non-acceptance.*" But this statute made a change as to the bills upon which a protest was required for non-acceptance or non-payment, requiring it only in the case of bills drawn for 20*l.* or upwards, and in which is expressed that they were for value received.

* The effect also of the protest on the parties was different * P. 46. in the two statutes.

The statute 9 & 10 W. 3. seems to have been intended for the benefit of the drawer: for though under it by s. 2. "If the holder makes such a protest, and gives notice within 14 days, he shall recover from the drawer the amount of the bill and all interest and charges; but if he neglects to give to the drawer notice of the protest within 14 days, *he* (the holder) is liable to all costs and charges accrued thereby."

And therefore where the holder of an inland bill of exchange which had been accepted, but not paid when due, had Benson. made no protest: it was adjudged under this statute that in 2 Stra. 910. an action against the drawer that *no interest could be recovered.*

"But in such case of neglect of making the protest, the right to recover the amount of the bill is no way affected, it only goes to *the interest and costs.*"

For the want of a protest is no bar to an action by the holder Borough v. of an inland bill of exchange against the drawer: neither is it Perkins, necessary for the holder to set out a protest in his declaration. 1 Salk. 131.

This statute therefore gives damages *against the holder of the bill* if he does not give notice to the drawer, and any damage 6 Mod. 81. S. C.

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mage arises in consequence : But the stat. of *Ann. f. 5.* deprives * the holder of damages, interest and costs, if he neglects to protest, either for non-acceptance or non-payment, and give notice within 14 days.

As to protests, these points are settled

1st. " If a bill is not accepted it should *immediately* be protested and notice given to the drawer : for it is not sufficient to give notice of the *non-acceptance* when the bill *comes payable*."

Goostrey v. Mead. West. 1751. Buller N.P. 271. For where defendant drew a bill at 60 days sight, payable to *W. S.* or order ; he indorsed it to the plaintiff, who presented it for acceptance and was refused : plaintiff then noted it for non-acceptance, *but did not protest it till the end of 60 days*, when he protested it for non-payment, and then wrote to defendant and to his agent notice of the non-acceptance. Afterward having brought this action against defendant the drawer, he was non-suited : for by not sending the protest for non-acceptance, he made himself liable. And *Note*, The bill should be noted for non-acceptance the day it is refused ; and when the protest is drawn, it may be dated that day.

Dehors v. Harriot. Show. 163. 2 Ref. 2d. Where *a bill is lost* and a new bill cannot be had from the drawer, a protest may be made, *on a copy*, particularly where the refusal of payment was not for want of the original bill, but merely for another cause ; so that the party who was to pay did not insist on the original bill's being delivered

* P. 48. up. But if a bill is lost, and the drawer can be reformed * to for a new bill, there a protest cannot be made on a copy. By stat 9 & 10 W. 3. c. 17. " If any inland bill of exchange is lost or miscarries, within the time limited for payment of the same, drawer shall give other bills of the same tenor and date, security being given to indemnify him if the first bill is found."

Tassel and Lee v. Lewis. Ld. Raym. 743. 3d. There are three days of grace allowed to bills of exchange, and the bill is not to be protested till those three days are expired. But if the last is a *Sunday* or great holyday, payee ought to demand the money on the second day ; and if not paid, protest the same day, or it is at his own peril.

Molloy 285. 4th. If a bill of exchange is accepted and the party dies, yet there must be a demand on the executors or administrators ; and if the bill is payable even before they can be appointed, yet should a protest be made.

Buller N.P. 271. Molloy 285. 5th. If a bill is drawn on a person who lives in the country, and he is not to be met with, upon which his friends accept it for his honour ; this acceptance shall bind the person so accepting to the payment of the money ; but the bill should be protested for want of acceptance by the original drawee.

Buller N.P. 271. Molloy 285. 6th. If a bill be left with a merchant to accept, he to whom it is payable, in case it be lost, is to request the merchant to give him a note for payment of the money according to the time limited by the bill ; otherwise there * must be two protests, one for non-acceptance, the other for non-payment.

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7th. The protest is made before a notary public in case of Buller non-acceptance or non payment; to his protest all foreign N. P. courts give credit, and the protest is evidence that the bill is 270. not paid. But in *England* the bill itself must be shewn as well as the protest, because the whole declaration must be proved: and when a bill is returned protested, the drawer of the bill is obliged to answer the money and damages, or to give security to answer the same beyond sea, within double the time the first bill had to run. But in *Molloy* 283. it is said, he shall only have as much time as the first bill had to run.

5th. Having thus far considered the nature and negotiability of bills of exchange: We shall conclude with the cases on the head.

Of the Nature of Payments by Bills of Exchange or Promissory Notes.

Payment by bill of exchange was formerly deemed to be *Clarke v. no discharge for a precedent debt, unless there was an ex-Mundal. preps agreement that it should be so: but as to inland bills, Salk. 124. that is now altered by stat. 3 & 4 Ann. c. 9. s. 7. which enacts, 3 W. & M. Temp.* that "if any person accept such a bill of exchange for and
"in satisfaction of a debt, the same shall be esteemed a full
"and sufficient discharge; if the person accepting such bill
"for his debt, does not take his due course by endeavour-
"ing to get the same * accepted and paid, and make his pro- * P. 50.
"test for non-payment or non-acceptance."

But if the holder of the note does use due diligence to get payment of the note, and follows the direction of the statute; if the note is not paid, he does not sustain the loss. The cases therefore upon this head turn upon the question, what shall be deemed due diligence to get the money from the acceptor of a bill or maker of the note, (for the law as to these in respect to laches is the same) and it goes on this principle, that by keeping possession of the bill or note after it becomes due, without getting the money from the acceptor or person who is liable to the payment, it is giving an implied credit to such person, and besides (in case of failure) preventing the indorser or person who paid away the note from getting the money himself when due.

1st. *As in the Case of Promissory Notes.*

Plaintiff sold goods to defendant, who paid him with a *Acheson v. promissory note of A's. Plaintiff demanded the money from George. A. but gave him time repeatedly till A. failed. It was ad- Burr. judged that the loss should fall upon plaintiff who by so giving 353. credit, had discharged defendant,*

So where the indorsee of a promissory note received part *Kellock v. of the money from the drawer of the note: It was held to Robinfon. be a taking upon himself to give the whole credit to the draw- 2Stra. 745. er of the note and absolutely to discharge the indorser.*

2dly.

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* P. 51. * 2dly. *In the Case of Bills of Exchange.*

Gee v. Brown. 2 Stra. 792. In an action on an accepted inland bill of exchange by the indorsee against the drawer, it appeared that the bill was due the 14th of *May*; but that upon a promise of payment indorsee gave the acceptor time till the 20th of *May*, and so on at different times till the 7th of *June*, when the acceptor failed: and there being no notice to the drawer, the loss was adjudged to be against the indorsee.

Hull v. Pitfield. 1 Will. 46. So where drawer was sued by the indorsee, and his bail paid the money, it was adjudged a clear discharge to the indorser. The case here was that the bail had taken an assignment of the note for the purpose of charging the indorser with it; but the note was held to be discharged by the payment.

I shall now consider the particular cases in which the holder of the bill shall be charged with the loss, by reason of his neglect, or be exempt from it from having used a due degree of diligence.

1st. *In the Case of Bills before Acceptance.*

1. "Where a bill of exchange is drawn on any person, it is presumed that the drawee has effects of the drawer's in his hands to the amount of the bill; if he therefore refuses to accept it, notice must be given to the drawer in order that he may take steps for his own security; and if such notice is not given, and drawee fails, the payee must stand at the loss. And the same notice is required in case of an *indorsed bill*." St. 3 & 4 Ann. c. 9. f. 7.

* P. 52. * For where defendants who were original payees of a bill of exchange, indorsed it over to plaintiff before it had been accepted, and on being tendered for acceptance by the plaintiff, drawee refused to accept it; plaintiff gave no notice of this for three weeks to defendants; and at the end of the three weeks the drawer failed: the loss was adjudged to fall on the plaintiff, for as the drawer was liable to defendants, who were payees, and he continued solvent for three weeks; if plaintiff had given notice, defendants might have obtained the money from the drawer, and therefore the plaintiff must suffer for his own neglect and laches. Bliffard v. Hunt & al. 5 Burr. 2670.

Brockdike v. Beleman. Mich. 27. G. 3. B. R. But where it appears that there were no effects of the drawer's in drawee's hands, so that no possible loss could accrue to the drawer from want of notice, as if drawn fraudulently for a blind or delay, where the parties have no dealings, there the payee or indorsee shall not stand at the loss of the amount of the bill from not having given notice; for there the foundation of the rule fails (*vide* this case *plen.* chapt. of trover) and this decision has since been often recognized.

2d. "And on the same principle, where payment is made by any such bill or draught, it *ought to be immediately tendered for acceptance or payment*; for though drawee may be solvent,

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" solvent, when the bill is drawn, if it is kept long untendered for acceptance. he may become insolvent."

* Therefore where defendant being indebted to the plaintiff, * P. 53. paid him by a bill on one *Heddy*, payable a few days after Chamber-date, and plaintiff held the bill for four months, without applying for payment. *Heddy* afterwards became insolvent: it was adjudged that the loss should fall on plaintiff for his neglect. *la Rive.* ²Willc 353.

2d. " Where bills *have been accepted* and paid away, the law is the same."

1st. " But it is to be observed, that as the acceptor of a bill of exchange is first liable, nothing but an *express agreement* on the part of the holder of the bill shall discharge *him*; mere implication shall never be sufficient: " Therefore in this case, where the plaintiff, who was indorsee, applied to the drawer of the bill for payment (it being an accommodation bill and no value given to acceptor) and received interest from him; and did not apply to defendant who was the acceptor, for several years; yet he afterward recovered from him (the acceptor) the amount of the bill, this amounting not to an *express discharge*: for where there is such express discharge, the acceptor cannot be resorted to. *Dingwall v. Dunster.* Dougl. 235.

As where plaintiff, who was indorsee, first arrested the defendant (the acceptor) but finding that no consideration had been given for the acceptance, his attorney took a security from the drawer, and wrote to defendant, " that he had settled with the drawer and that he need trouble himself no more: " This was held to be an absolute * discharge as to defendant, and that plaintiff could never after charge *him*. *Black v. Peele.* ^{quot.} Dougl. 236. * P. 54.

" As the acceptor therefore is at all times liable; no question can ever arise, on the circumstance of loss, except in the case of his insolvency. So in the case of promissory notes, the only question that can arise there is, when the maker becomes insolvent." And,

1st. " Every payee or indorsee should apply for payment of an accepted bill *as soon as it is due*, or in case of a loss he must sustain it."

The bill in question was at six days sight, accepted the 8th of February, and by the three days of grace was payable the 17th, which was on a Saturday; when the bill was not tendered, and the acceptor stopped the Tuesday following: It was adjudged that the drawer was discharged at the end of the three days of grace. *Sayer.* ²Stra. 829.

For if the bill is kept for a long time it shall be presumed to be paid, because there is a trust between the parties, and it may be prejudicial to commerce, if a bill may rise up to charge the drawer at any distance of time, when in the mean time all reckonings and accounts are adjusted between him and the drawee. *Allen v. Dockwra.* Salk. 127.

" And in the case of promissory notes, the maker of the note

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"note should be applied to for payment when it becomes due,
"or the holder in case of a loss must suffer it."

* P. 55.

Pepys v.
Sir John
Lambert.
1 Stra. 707.

* As where the third indorsee of a promissory note kept it for two months without receiving the money from the maker: In an action against the first indorsee without notice, the plaintiff was nonsuited for his neglect.

2d. "But circumstances may occur in which the note or bill may be held beyond the time it becomes payable, and yet the holder not be charged in case of a loss. For the mere holding beyond the time does *not of itself* effect a charge."

Anson v.
Bailey.
Mich. 1748.
G. Hall.
Buller N P
276.

As where defendant having a promissory note payable to him or order two months after date, of one *Smith*, indorsed it to the plaintiff, who sent his servant for the money to *Smith*; he said that defendant had promised not to indorse it, without first acquainting him, and that he was not then ready but would pay it in a few days, and so put it off from time to time: after three weeks elapsed, plaintiff wrote to defendant, not having sooner learned his address (though it was proved that he had sooner enquired after it) the circumstances above. Then *Smith* failed: Plaintiff wrote again, and defendant answered that when he came to town he would put all matters to rights. Upon this evidence the jury gave a verdict for the plaintiff as having used due diligence, though it was proved that *Smith* continued solvent for above three weeks, and paid upwards of 100*l.* in that time.

Tindal v.
Brown.
Hill. 26
G. 3. B. R.
Term. Rep.
* P. 56.
Goodman
v. Shipway.
Mich. 11.

3d. "But what shall be deemed reasonable notice of non-payment, is matter of law not of fact: and therefore in disputes of this * nature the courts control questions on that head in going to the jury."

Therefore where plaintiff kept bankers bills in his possession from *April* to *August*, and the banker having failed; he brought his action against the person who paid them to him, and had a verdict. The court granted a new trial.

G. 2.
Appletree
v. Sweet-
apple.
Mich. 23
G. 3. B. R.

So where the case was, that plaintiff received from defendant a banker's note early in the day, but did not call for payment the whole of that day, and in the evening of it the banker failed. A verdict was found for *defendant* on the ground, that it was the custom of the city, that bankers notes should be brought for payment the day they are received: but it appearing that there were many exceptions to this custom, in the case of factors at *Bear-key*, the salesmen at *Smithfield* and others; the court held the custom was not sufficiently proved, and even if the decision had been on that ground it must appear that the custom was reasonable, or the court would control it.

4th. "But where the holder of the bill has used due diligence, on that ground he shall be discharged from any loss."

Fletcher v.
Sandys.
2 Stra.
1248.

The note, which was a banker's, was paid to the plaintiff after dinner, who sent it next morning at nine for payment, when the banker had stopped: it was ruled that there was no laches

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laches in the plaintiff, so as to fix the loss on him; and that in all those cases there must be * a reasonable time allowed, * P. 57. consistent with the nature of circulating paper credit.

Defendants made a payment to the plaintiffs, with two bankers notes at two o'clock in the afternoon; at nine the next morning they were sent for payment, when the bankers had failed; adjudged that the loss must fall on defendants, the plaintiffs having been guilty of no laches. Moore v. Warren. Holme v. Barry. 1 Stra. 415.

"In these questions the usage and custom of business is the standard to decide them, if such is reasonable."

For where it was proved to be the usage of the Sword Blade Company, that when they received bankers notes to send them next morning for cash to the Bank, which cash was made up in bags, and called for by the clerk in the evening. Payment was made to them at three o'clock in the afternoon of two notes; next morning they were sent to the Bank, left there (as above) and the bank stopped payment just before the clerk called in the evening. It was adjudged that the loss must fall on defendant though the money might have been received in the morning, for the Company had only acted according to usage. Turner v. Mead. 2 Stra. 416. Hoare v. Da Costa. 2 Stra. 910. S. P.

5th. "But in cases in which the loss shall fall on the holder of the note, a distinction is to be observed in the cases of notes payable to the bearer when passed with or without indorsement."

* If a note payable to bearer (supposing it has some time to run) be discounted, without indorsement of the person who held it, he who so discounts it, takes it with all risks: for it is selling the bill like selling of tallies: but if the bill has been passed in payment of a debt antecedently due, or for money lent on the same bill, then is the person paying it, liable to all risks. But if the person who gets the bill discounted, indorses it, then may the indorsee have a remedy on the indorsement, if he demands the money in convenient time. This was the doctrine of Lord Holt, but the jury found a verdict otherwise. * P. 58. Bank of England v. New-man. 1 Ld. Raym. 443.

Before we conclude this head of bills of exchange it may be proper to consider notes or bills as joint or several.

If a note is joint the action may be brought against both or against either. If plaintiff declares against both, he must declare that defendants promised to pay jointly and severally, but if against one only, he must declare generally, that defendant promised to pay; and the note by two will be good evidence. For he that speaks in the disjunctive speaks true, if either member of the disjunctive be verified. Butler v. Mallissey, 1 Stra. 76. Rees v. Abbot, Cowp. 833. Ovington v. Neale, 2 Stra. 819.

2d. If the note had been a joint one and defendant had been sued as if several, defendant could only have pleaded that matter in abatement, and not taken advantage of it in error. Per Buller justice in Abbot v. Rees.

5th. The next class of contracts upon which this action is founded which I shall consider is that of

Policies

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* P. 59.

* Policies of Insurance.

Under this head I shall consider 1st. What policies are good. 2d. What shall avoid a policy 3d. The constructions on policies. 4th. Of total, partial and average losses. 5th. Of bar-ratry. 6th. Of apportionment of the præmium.

1st. What Policies are good.

1st. It is enacted by stat. 19 G. 2. c. 37. " That all insur-
" rances, interest or no interest, or without further proof of in-
" terest than the policy itself; all gaming or wagering poli-
" cies, or wherein the insurer shall have no benefit of salvage,
" are void; (except in the case of privateers or ships in the Spa-
" nish or Portugal trade): And no re-assurance shall be law-
" ful, except the former insurer is insolvent, a bankrupt, or
" dead."

Under this statute it has been decided,

Le Cras v. 1st. That though the property of all prizes and enemies
Hughes. goods captured by the king's land and sea forces, is in the
East 26G. king, until condemnation in the Court of Admiralty; yet that
3. B. R. the officers and men have an insurable property in things cap-
tured, by virtue of the prize act, and royal proclamation de-
claring the shares and proportions to the captors.

* P. 60. 2d. If the shipper of goods abroad indorses over to another
Hibbert v. the bills of lading, he thereby transfers the whole property in
Carter. the goods to the indorsee, and he has no insurable interest
E. 27G. 3. therein: but if it appears that there was any agreement be-
B. R. tween the indorser and indorsee, that such property was not
Term. meant to be given at the time, as if it was only to secure to the
Rep. 745. indorsee the net proceeds: or that indorser in case of a loss
had paid the sum for which the goods were assigned. He
there has an insurable interest.

Thellusson 3d. Policies upon foreign ships are not within the statute,
v. Fletcher on account of the difficulty of bringing witnesses from abroad
Doug1. 301. to prove the property. Therefore in insurances on foreign
ships, the policy is proof of interest sufficient; and in the case
of a judgment by default, plaintiff need only prove the sub-
scription to the policy by the defendant.

Kent v. 4th. Plaintiff gave to defendant 20l. on an agreement that
Bird. if a certain India ship reached China that season the plaintiff
Cowp. 583. was to receive nothing, but if the ship lost her passage that
season, defendant was to pay to the plaintiff 1000l. on the
ship's arrival in the river Thames. The ship lost her passage,
and plaintiff brought his action for the money; but it appear-
ing that he had none or little interest on board, it was held
to be clearly a wagering policy, and void under the statute.

5th. " But the property required by the statute in the in-
sured must be such as may legally be exported or imported."

For

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* For where it was made *on goods* for *New York*, which were * P. 61.
prohibited to be landed there by statute: the insurer was held *Johnston v.*
to be discharged as to them, though the clearances from the *Sutton.*
port of *London* were for another port (*Halifax*) to which the *Dougl.* 241.
goods might legally have been exported.

6th. In this case an insurance by the governor of *Fort Carter v.*
Marlborough in the *East Indies* was held good: for though *Boehm.*
called a *Fort*, it is not merely a place of defence, but rather *3 Burr.*
a place for merchandize. *1905.*

7th. By stat. 14 G. 3. c. 48. "All insurances *upon lives* *1 Black.*
or other events, without interest in the parties, are declared *Rep. 593.*
to be null and void." *S. C.*

Upon this statute a policy *on the sex of a person* was held *Roebuck*
to be void. *v. Hamer-*
ton. Cowp.

8th. By c. 5. of stat. 19 G. 2. s. 37. It is declared, *737.*
"That all money to be lent on bottomry or at respondentia on
ships trading to *India*, shall be lent only on the ship or on
the effects on board such ship, and shall be so expressed in
the condition of the bond: and the benefit of salvage shall
only be allowed *to the lender* of the money, his agents or
assigns, *who alone shall have a right to insure* the money so
lent; and the borrower shall in case of a loss recover no
more than the surplus of his property the above respon-
dencia or bottomry bond: And in case it shall appear, that
the value of the share in the ship and effects doth not amount
to the sum borrowed; the borrower * shall be responsible * P. 62.
to the lender for the deficiency, which interest for the
same and the assurance and other charges."

Under this clause of the statute, it has been held, that if *Black v.*
the lender of the money on bottomry, or at respondentia, in- *Glover.*
sures it; it must be specified in the policy *that it is bottomry* *3 Burr.*
or respondentia that is so assured. *1394.*

9th. A further regulation with regard to policies of insu-
rance is now made by stat. 25 G. 3. c. 44. which enacts,
"That no policy shall be made upon ships, goods or mer-
chandize, without inserting therein the christian and surname
of the persons interested therein, or the names of their re-
spective agents, who shall affect the same: And if the po-
licy be made for any person not residing in this kingdom,
without inserting therein the name of the agent of such
person to whom such goods, merchandize, &c. did belong,
the policy shall be null and void."

Under the statute it has been resolved, that where the in- *Pray v.*
surance is made for a person not resident in the kingdom, the *Edie. Trin.*
name of the agent must be inserted in the policy *as agent* to *26 G. 3.*
such person, or the policy is void. *B. R.*

10th. "As by the statute property is required in the in- *Term. Rep.*
sured when the policy is made; so it must subsist in the per- *313.*
"son

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“son at the time the loss happens, or in some one possessed of the same interest.”

* P. 63. * For where lessee for years insured an house for a time longer than his term: the term expired, and the house was afterward burned before the time insured for expired: it was adjudged, that the lessee could not assign the policy to the lessor, so as to enable him to sue on it; for the insurance is an indemnification of the person insuring, and if his interest is gone, so that he can sustain no loss, the policy is void and at an end.

Molloy de 11th. The destination of a ship must always be expressed in the body of the policy when the insurance is made: And Jur. Mar. therefore a policy on a ship from London to leaving & Nav. 257. a blank for the place of destination, is void.

Lowry v. But though in the case of gaming or wagering policies the Bourdieu. insured cannot recover, yet if such a policy is underwritten Dougl. by an insurer and the premium paid; the insured cannot recover back the premium so paid, on the ground, that it was 451. paid without consideration; because that in case of a loss the insurers would not be chargeable: for in *pari delicto potior est conditio defendentis*.

2. I shall now consider *What shall avoid a Policy*.

This is either 1st. By matter previous to the making of the policy, or 2. By matter subsequent.

* P. 64. * 1. By matter previous to the making of the policy. As 1. By a false representation. 2d. By a false warranty. 3d. By a concealment of circumstances.

“As to the 1st. It is a general rule that a false representation of any matter, before the policy has been signed, shall avoid it as against the insurer, on the ground of fraud.”

McDowell v. Fra- As where the broker in procuring an insurance on a ship ser. Dougl. from New York to Philadelphia stated, “that she had been 247. seen in the Delaware on the 11th of December,” whereas in fact, she was lost on the 9th of December. It was held that this misrepresentation avoided the policy: for the representation should be true as to all the insured knows, and if he represents facts to the underwriter without knowing the truth, he takes the risk upon himself.

“But the representation must be a positive assertion.”

Barber v. For where the broker only stated, “that the ship was expected to sail in November or December,” though in fact she had Fletcher. sailed before; yet was the policy held to stand good: for it Dougl. was only stated as an expectation, and the underwriter did not 292. inquire into the ground of expectation.

Note, It was held in this case, that a representation to the first underwriter on any policy shall extend to all the others whose names are on it.

Therefore,

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* Therefore, where an under-writer put his name first on a policy as a decoy to induce others to sign, and on a promise that he should not be sued: this was held to be a fraudulent representation and to avoid the policy. But that the insurer should return the premium. *Wilson v. Duckett.* 3 Burr. 1361.

2d. "But in order to avoid a policy in consequence of misrepresentation: the representation must be *material*, and at the same time *be false*, for though the representation be not strictly true, yet if it is more beneficial to the under-writers, the policy shall be good."

For where the instructions to insure shewn to the under-writers, stated the ship to carry "12 guns and 20 men." And in fact she sailed with a greater force: the policy was held to be good, the representation being substantially performed and in favour of the insurer. *Pawson v. Watson.* Cowp. 785.

"And the construction of the representation shall be taken according to the import of the words, as used at sea or common acceptance."

Therefore where the ship was warranted to be manned with thirty seamen: this was held to include the ordinary crew, as officers, boys, &c. who are deemed to be seamen at the Custom-house, Greenwich Hospital, and in the distribution of prizes. *Bean v. Stuart.* Dougl. 11.

2d. "Such is the case of a representation as affecting the validity of a policy, but the case of a warranty is still stronger, as it makes * part of the policy itself; it must be strictly and literally performed, and nothing tantamount will do. * P. 66.

As to which it has been settled,

1st. That to make a warranty it must be inserted in the policy: if it is on a distinct piece of paper, or wafered to the policy, or made verbally, it is but a representation: but it may be inserted in the margin of the policy, and it then shall be deemed a warranty. *Pawson v. Watson.* Cowp. 785. *Kenyon & Ashton v. Berthon.* Dougl. 12. in not.

2d. "The warranty is only of the circumstances stated at the time of under-writing the policy, that they are then true; and if so, the insurers are liable for all future risks."

The insurance was made on a ship warranted neutral property, which was the case when made: during her voyage war was declared against the power to whom she belonged, whereby she ceased to be neutral. She was captured, and the under-writers insisted, that the warranty was to extend to the whole of the voyage: but it was held, that the warranty only extended to the time when the policy was made and when the risk commenced, and so that the insurer was liable. *Eden v. Parkinson.* Dougl. 705.

But where plaintiff insured a ship warranted to be neutral property, and it was found to be not neutral property, the insurer was discharged, though the loss did not happen by capture, but from having foundered: for the warranty was false at the time of making the policy, and so the policy void. *Woolmer v. Muilman.* 3 Burr. 1419. *Black Rep.* 427. S. C.

D

3d. "For

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- * P. 67. • 3d. "For a warranty is so absolute, that nothing but a
 "performance of the conditions of it shall discharge it; but
 "it shall be absolute under every circumstance as against
 "the parties.

1st. As against the insured.

Hore v. For where a ship was warranted to sail from *Jamaica*, on
 Whitmore, or before a particular day, and before that day *was prevented*
 Cowp. 784. *from sailing by an embargo*. The insurer was held to be dis-
 charged, tho' the terms of the policy *could* not be performed.
 Bond v. *She be* So if ~~she be~~ detained beyond the day she is warranted to
 Nutt. fail, by any cause whatever, as by dangerous weather, want
 Cowp. 601. of repair, the enemy being off the port or such; in all these
 2 Ref. cases the insurer is discharged.

2d. As against the Insurers.

"The same literal adherence to the terms of the policy
 "shall charge them."

Bond v. As if a ship warranted to sail by a certain day, before
 Nutt. that day breaks ground on her voyage home, though she is
 Cowp. 601. put back by stress of weather, or re-called by an embargo;
 Dougl. 353. the policy remains good, though she does not sail afterward
 S. C. till long after the day. For she has performed the terms of
 3 Ref. the policy, by beginning her voyage at the day.

Earl v. Har- So where the ship *Leghorn Galley* was warranted to sail
 ris. from *Jamaica* on or before the 1st of *August*, and sail'd from
 Dougl. 343. her port *Savanna de la Mar* on the 1st of *August*, with a full

- * P. 68. cargo and her clearances on board, and proceeded to **Blue-*
fields, where she expected a convoy; but was there detained
 by an embargo. This was held to be a sufficient inception of
 the voyage to answer the terms of the policy, and the insurer
 liable, the ship having been taken.

3d. "The third case in which a policy may be avoided,
 "by matter previous to the signing of the policy, is by a con-
 "cealment of circumstances affecting the ship, &c. at the time
 "of making the insurance."

As to this it has been decided,

Per Lord "1st. That the keeping back any circumstance in his
 Mansfield. knowledge by the insured to mislead the under-writer into
 3 Burr. "a belief that the circumstance did not exist, or to estimate
 1909. "the risque, as if it did not exist, is a fraud, and avoids the
 "policy. And the case is the same though the suppression
 "happened through mistake, and without any fraudulent in-
 "tent; for the insurer is deceived.

Seaman v. On the 25th of *August* defendant under-wrote a ship from
 Fonnereau. *Carolina* to *Holland*. It appeared that on the 23d of *August*
 2 Stra. 1183. the agent for the plaintiff had received a letter, wherein it
 was mentioned, "That the writer was in company with the
 "ship in question on the 12th of *August*, and that at 12 at
 "night he lost sight of her all at once, and that the captain of
 "her the day before had complained, that she was leaky."
 This letter was not communicated to the under-writer. In
 fact

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Let the ship continued her voyage until the 19th, when she was taken by the *Spaniards*, and there was no * pretence of any knowledge of an actual loss when the insurance was made, and it was made in consequence of a letter received from the plaintiff, dated 27th of *June* before. But the concealment of the letter was deemed a fraud on the insurer, and he was held to be discharged. * P. 69.

For whatever accounts the insured or his agent have received of the loss or other circumstance in which the safety of the ship is concerned, these should be communicated to the under-writer, or the policy shall be void. *Da Costa v. Scandrut, 2 P. Wms. 170.*

And on the same ground, a concealment of the true port of lading from whence the ship sailed, was held sufficient to void the policy. *Hodgson v. Richardson, 1 Black. Rep. 463.*

2d. "But the insured may be innocently silent, as to grounds open to both to exercise their judgments on; therefore he need not mention, what the insured knows already; or what he ought to know; what he takes upon himself to know or what he waives being informed of." *Per Lord Mansfield. 3 Burr. 1910.*

As if an under-writer insures a private ship of war, he need not be told the secret enterprize it is destined for, because he knows some expedition is in view, and from the nature of the contract he waives the information. *Ibid.*

So where defendant under-wrote a policy against the taking of *Fort Marlborough* in the *East Indies*, by the enemy for one year, on the part of the governor. In an action on the policy it was resolved, 1st. That it was no concealment of circumstances that the state of the * fort and fortifications was not made known to the insurer. 1st. Because he had made no inquiry to this particular, and 2dly, That it was the risk of being attacked only that was insured; and 3dly, It was resolved, that it was not necessary to make known to the insurers the governor's opinions, and surmises, on the probability of an expedition against it, which were mere surmises, and equally lying within the knowledge and conjectures of the insurers themselves. *Carter v. Boehm, 3 Burr. 1905. 1 Black Rep. 593. S. C.*

"For the under-writer is bound to know every cause which may occasion natural perils: *as the difficulty of the voyage, the seasons, &c.* as also all *political dangers*, as the probability of a declaration of a war, or peace. And he therefore cannot screen himself under an ignorance of any of these circumstances." * P. 70. *Per Lord Mansfield in S. C.*

As where a ship was insured before war was declared, but when it was daily expected, and she did not sail till after war had been declared; it was adjudged, that there was no concealment here, as to the under-writer, and that the policy remained good. *Planche v. Fletcher, Dougl. 240. 2 Ref.*

"So the insurer is bound to know the course of trade, and where a loss happens if in the common course of that trade, he is liable."

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Noble v. Kennoway, Dougl. 492. As where the policy was on a *ship to Labrador on the fishery, and the cargo until discharged*. The ship arrived, but the cargo was not discharged for a considerable time, and during

* P. 71. * that time the ship was cut out of the harbour by a privateer. It was objected, that this delay and neglect in the ship's discharging her cargo, should avoid the policy. But it being proved to be *the usage and course of trade* to discharge the cargoes of ships by degrees, and in that manner; the court held, that the under-writer was bound to know it as such, and that it must be deemed to be within the policy, and the under-writer be liable.

S. C. 2dly. That though the question on the particular branch of trade, to the place in question might be *new*, yet that the course and practice of *the same trade to a different place*, was good and admissible evidence. As the mode of trade and fishing at *Newfoundland* is admissible evidence as to the same trade to *Labrador*.

Salvador v. Hopkins, 3 Burr. 1707. So where the insurance was upon an *India ship*, chartered in the common printed form, in which is a clause; that the Company may detain the ship in *India* for twelve months, otherwise she is to be allowed to return within a stated time. The ship in question was detained, and the insurance was made, without notice that she had been so detained, but made merely on the charter-party. A loss having taken place, the insurers contested the payment on the ground, that having no notice of the detention, it was a concealment of circumstances; but it being proved that such detention was the common course of the *India* trade, was within the terms of the charter-party,

* P. 72. and so a risk then in contemplation, and that the fact of detention might be known at the India House. The court on these grounds held the insurers liable.

These are the cases in which policies of insurance have been declared to be void, from matter existing before the making of them. We shall now consider

2dly. *How Policies may be avoided by matter subsequent.*

1st. "It is a general rule that the terms of the policy are to be strictly adhered to, for any variation from the risk insured, discharges the under-writer."

"Upon this ground, where a certain voyage is insured, any deviation from the direct course of that voyage avoids the policy."

But 1st. "An intention to deviate will not avoid the policy, if a loss happens while the ship was in her direct course."
 Foster v. Wilmer, 2 Str. 1249. For where the ship was insured from *Carolina to Lisbon* and from thence to *Bristol*, and the captain had taken in salt, which he was to deliver at *Falmouth* out of his course, before he went to *Bristol*. He was taken in the direct track to both places, before the dividing point; and the insurance was held to stand good as against the under-writers.

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For where a partial loss happens in the case of an insurance, *Green v. Young.* and in the same voyage a deviation is *afterwards made*, the insured shall recover for such loss; for the policy is only discharged *from the time of the deviation.* *Salk. 444.* *2 Ld. Raym. 840. S. C.*

* 2d. "But if in fact the ship does not proceed at all on the voyage insured, though she may be in the track of it, yet shall the policy be discharged." * P. 73.

The insurance in this case was on a ship from *Maryland* to *Wooldridge* *Cadiz*: she was taken in the *Chesapeake*; all her clearances *v. Boydel.* were for *Falmouth*, and a market, and the place of capture was *Dougl. 16.* in the course for both places, and before the dividing point. In an action against the insurers, it was held that as the evidence of her clearances shewed her destination to be different from that insured; it was not the voyage the insurer meant to underwrite, and he was therefore discharged.

For the policy should attach when the ship sets out on her voyage, or it cannot after. So that if she sails before the time fixed in the policy, it never attaches. *Way v. Modigliani.* *Trin. 27.*

3d. "But a deviation is excusable in the following cases." *Geo. 3.* 1st. "In the case of *necessity*," as if a ship becomes leaky, *2 Term Rep. 30.*

she may go out of the direct course to another port to repair. *Lavabre v. Wilson.* But in such case it must appear that such deviation was clearly through necessity. For if it was used for any trading or such other purposes, it is not an excusable deviation. And therefore the ship is compelled to leave her direct course by such necessity, she must proceed to such place of safety in direct course, and in the shortest possible time. *Dougl. 271.*

For to make a deviation criminal, and so discharge the underwriter. *It must be done voluntarily.*

* For when a ship went out with a letter of marque, insured from *Bristol* to *Newfoundland*, and having taken a prize, the colors rose and compelled the captain to leave his course for *Newfoundland* and return to *Bristol*. In an action against the insurers who set up a deviation in their defence; it was resolved that it was excused by reason of the force used against the captain, which he could not resist, and so fell within the case of necessity, which had been always admitted as an excuse. ** P. 74* *Elton v. Brogden.* *2 Stra. 1264.*

2dly. For the sake of *greater security* a deviation is excusable. As where a ship deviates something from her course for the sake of meeting with a convoy: this shall not be deemed a deviation sufficient to discharge the insurer. But the ship should wait for a convoy; for the underwriter is supposed to estimate the time his risque continues, in rating the premium, and therefore it must not be prolonged, unless through necessity. *Bond v. Nutt.* *Cowp. 604.* *4 Rcl.*

3dly. "Where the known usage of trade admits it." For where a ship was insured from *London* to *Nantz*, allowed to touch at *Ostend*, and all her clearances were to *Ostend*, it being proved to be the usage of the trade, to clear for that port and go to another to avoid the *French* duties, and this known *Planche v. Fletcher.* *Dougl. 240.* *Bond v. Gonfales.* *Salk. 445.* *S. P.*

For

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known to be the established mode, the policy was held to be good against the under-writer.

- * P. 75. * 2dly. "But though such strict adherence is required to the terms of the policy, yet some latitude is admitted as to the usage and course of trade, *so as to take in losses not within the strict letter of the policy.*"

Pelly v.
Royal Ex-
change
Assurance
Company.
1 Burr. 341.

For where defendants had underwritten a ship to *China* in the usual form "against all losses by sea, &c." When the ship reached *China*, she was unrigged and the rigging brought on shore, where by accident it was consumed by fire. The insured brought their action to be repaid their damage, and the defendants refused to pay, on the grounds that it was a loss on land, and so not within the policy. But it being proved that it was the established course of the trade so to unrig the ship, the plaintiff recovered.

3d. "To determine therefore what shall be an adherence to the terms of policies, the several *constructions on them* are to be attended to."

Molloy de
Jur. Mar. &
Nav. 255.

And 1st. If a merchant insures a ship generally, as of such a burthen; this assurance shall take in the ship only, and not any of the merchandize on board her. But in insuring the cargo, it is not necessary to specify the particular goods, it is sufficient to say on the wares, merchandizes, &c. on board such a ship.

Tonge v.
Watts,
1 Stra. 1251.

So where plaintiff made an insurance on a ship and freight, the ship was then careening before she took in her lading, and a tempest having arisen, she was lost; it was adjudged that the plaintiff should only recover for the loss of the ship, but not for the freight, the goods not being actually on board, so as to make the plaintiff's right to freight commence.

Molloy 255.

2d. If a ship is insured from a port, the insurance does not commence until the voyage is begun, so that the insurer is not liable for a loss in port; but if she once breaks ground though driven back into port, the insurer is liable for a loss, for the voyage was begun. But an insurance at and from a port, includes losses while in port.

Molloy de
Jur. Mar. &
Nav. 256.

3d. If goods are insured on board any ship and she becomes leaky, if the master and supercargo take them from that ship and put them on board another, the policy is discharged, unless there are these words "the goods laden to be carried by such a ship or any other until safely landed," in which case the insurers are liable.

4th. "When an insurance is made for any given time, "that time must be successive, not at different periods."

Syers v.
Bridge,
Doug. 509.

As in this case the insurance was on a letter of marque for six weeks, this it was held should be for six successive weeks, not part at one time and part at another.

Waples v.
Fames,
1 Stra. 1243.

5th. The insurance is generally for such a voyage or time, and until moored for 24 hours in safety, under this clause where a vessel came in, but before the 24 hours expired, was ordered out again to perform quarantine for fourteen days, during which

* P. 77.

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which time she was lost: It was adjudged to be within the risk insured, she not being moored 24 hours in safety, and the insurer liable.

6th. If a ship is insured to go with convoy, she is warranted by that policy to go to the place where the convoy is, and if in her way thither she is captured, the insurers shall be charged.

* So where a ship sails in pursuance of signal to join a convoy, but is prevented by bad weather from receiving her sailing orders, yet it is a sailing with convoy within the policy.

7th. That clause in policies of insurance, "to be free from average unless general, or the ship be stranded," means, that only in these two cases, of a general average, or the stranding of the ship; the insurers shall be liable to such damages as arise from thence; but all other partial losses are excluded.

4th. Of total, partial, and average Losses; and how far the Insurer is liable for each.

1st. "After notice of loss of the ship insured, the insured may abandon to the insurers and recover for a total loss, and then the insurers stand in their right, to recover as much of the property as they can."

"But the principle of abandonment has been restrained in many instances for fear of fraud, and only is allowed where the loss is of such a nature as appears to be a total one: for the merchant, where there is only an average loss, shall not be allowed by abandoning to make it a total one. For abandonment shall only be allowed in case of a total loss. And so it should be made in the first instance, for if the insured endeavour to recover part of the property, they shall not afterward be allowed to go for a total loss."

As in these cases.

Where the ship was by bad weather obliged to throw great part of her cargo overboard, was afterward captured by the enemy; and being recaptured and brought into port, her cargo was found of little worth, and ship damaged. It was held that the insured might abandon and recover for a total loss.

So where the ship had been taken and recaptured, and the salvage and repairs amounted to so considerable a sum, that the captain deemed it for the benefit of the owner to sell her in a foreign port; the insured recovered for a total loss.

So where the cargo of the ship insured received so much damage, that the value of the part saved came to less than the freight; the insured were allowed to recover for a total loss.

2d. But the mere capture of a ship, if afterwards retaken without any damage, will not give the insured a right to abandon: but the plaintiff on such a policy can only recover

Gordon v. Morley, and Campbell v. Bourdieu.

2 Stra. 1265. *Victorin v. Cleve.

2 Stra. 1250. Wilson v. Smith.

3 Burr. 1550. 1 Black. Rep. 507. S. C.

Molloy de Jur. Mar. & Nav. 257

2 Burr. 697 * P. 78.

Cazalet v. St. Barb. Pasc. 26 G. 3. B. R. Mitchell v. Edie. Hil. 27 G. 3.

Goss v. Withers.

2 Burr. 983.

Milles v. Fletcher. Dougl. 219.

Boyfield v. Brown. 2 Stra. 1065.

Hamilton v. Mendez. 2 Burr. 1214.

1 Black. Rep. 277. S. C.

* P. 79.

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an indemnity according to the nature of his case at the time of the action brought, or at most at the time of the offer to abandon.

Dean v.
Dicker.
2 Stra. 1250.

In this case the ship insured was captured and carried into the enemies port, where she remained eight days, when she was cut out by an *Engl. sh* ship. The court held, that the ship being so long *infra presidia* and in the enemies power, it was a total loss as against the insurers. But according to Lord Mansfield's doctrine in the case of *Goss v. Withers*; it seems to be undecided what capture shall be construed a total loss.

3d. "The loss, to charge the insurer must happen during the existence of the policy: For though the *cause of the loss* happened during the existence of the policy, yet if the loss did not actually happen till it expired, the insurers are not liable."

Menetone
v. Dunlop.
Pasch.
23 G. 3.
B. R.

For where the policy was for six months on a ship to *New York*, and during her voyage she sprung a leak, and by the opinion of the carpenter and crew, thereby received her death's wound. This was on the 1st of *January*, and on the 3d the policy expired: she was however kept above water till the 7th, when she sunk. The under-writers were held to be discharged, though she received her death's wound during the existence of the policy; the loss not having happened till after the policy had expired.

* P. 80.

"For by no reference or retrospect, shall the insurer be be charged, when the risque has been run during the existence of the policy; and the voyage performed, which was insured."

Lockyer v.
Offley.
Pasch.
26 G. 3.
B. R. Term.
Rep. 252.

For where the master during the voyage insured, had been guilty of barratry, by smuggling brandy, &c. hovering near the coast; the ship arrived safe in the *Thames*; but was 27 days afterwards seized, under an information for the smuggling, and restored on payment of the exchequer composition of 230*l*. The insured offered to abandon, but the court held, this not to be a loss within the terms of the policy. For so after many voyages and final settlements between the parties might a source of litigation be opened.

4th. "The insurer shall be liable for no loss, unless it falls exactly within the terms of the policy."

Jones v.
Small
Trin.
25 G. 3.
Term. Rep.
130. In not.

Policy against loss by mutiny, and on a cargo of slaves from *Africa* to the *West Indies*: they did mutiny, some were shot, some died of their wounds, others in despair jump'd overboard and were drowned, and some drank salt water of which they died after the ship came into port. It was held, that for those who were shot or perished of their wounds, as arising from mutiny, the insured should recover, but not for those who perished from collateral circumstances.

5th. "Where the insured takes the goods into his own possession, the insurer then becomes discharged."

Defendant

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* Defendant under-wrote a policy on goods of the plain- * **P. 81.**
tiff till the same should be safely landed in London; the ship Sparrow v.
arrived in port, and plaintiff took out the goods and put them Carru-
into his own lighters, from whence they were lost: it was thers. 2
adjudged, that the plaintiff having taken his goods out of Stra. 1236.
the possession of the captain of the ship into his own, that the
insurer was discharged.

Note, in settling losses this rule is observed.

If the policy is a valued one, and part of the goods are da- Lewis v.
maged, the average is settled by this rule. The insurer Rucker.
shall pay to the insured the same proportion of the valued Burr.
price, that the loss on the goods at the port of sale, bears to 1167.
the price they might have been sold for, if no such loss had
happened: as if the goods undamaged would sell for 20*l.*
per hogshead, but in consequence of the damage produced
but 15*l.* Here they have suffered a loss of 5*l.* or one-fourth
of their value, therefore one-fourth of the valued price must
be made good by the insurer.

5th. Of Barratry.

“ Barratry is one of the risques insured against in all po-
licies of insurance, and is a loss occasioned by any fraud
“ of the master or mariners.”

1. As where the master attempted to run the ship out of * **P. 82.**
port without paying the duties, and * was stopt, whereby Knight v.
the ship was forfeited: this was adjudged to be barratry, Cam-
and to subject the insurers, as done *per fraudem* & *negli-* bridge. 1
gentiam of the master. Stra. 531.

2. “ It is essential to barratry that the wrong be com-
“ mitted by the master and mariners *against the owners*;
“ and therefore if the owner is privy to, or the cause of it,
“ the insurer is not liable, for it is not barratry.”

As where *Le Grand* was owner of the ship, and having Nutt affig-
obtained goods from *Hague* the bankrupt, (which *Hague* in- nee of
sured) went himself on board the vessel, and by his con- Hague v.
trivance, carried the vessel to a different port, and so de- Bourdieu.
frauded *Hague*. This was held not to be barratry, *Le Grand* Trin. 26
the owner being privy to, and concerned in the fraud. G. 3.
Term.

3d. “ So that to constitute barratry it must be done *without* Rep. 323.
“ the knowledge of, and against the interest of the owners.”

For where defendant underwrote a ship to *Marseilles*, Stamma v.
and she was afterwards advertised to carry goods to *Genoa*, Brown.
and the agent gave out that she should go to *Genoa* before 2 Stra.
she went to *Marseilles*, which defendant insisted should not 1173.
be done, as being contrary to the terms of the policy: how-
ever she sailed first for *Genoa*, and in return to her course to
Marseilles was blown up. The plaintiffs attempted to make
this out to be barratry in the master: but the court held,
that it being premeditated and for the benefit of the owners,
could

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* P. 83. could not be construed barratry, but * was a deviation which discharged the insurers.

Vallejo v. Wheeler. And therefore where the master left his course on a smuggling business *without the knowledge* of the owners, and was taken in his return to his right course: it was adjudged to be barratry in the master and the insurer liable; for the loss was in fact the *consequence* of the deviation for a fraudulent purpose.

143.

6th. Of Apportionment and return of the Premium.

3 Burr.
1240.
Cowp.
668.

1. "If a policy is under-written, and the risk not run, though it has arisen from the fault of the insured, yet the insurer shall return the premium: but if the risk has once commenced, the insured shall not have a return of the premium if they do not chuse to proceed on the voyage, *unless the contract and voyage is of a divisible nature.*"

Stevenson
v. Snow.
3 Burr.
1237.

As where the ship was insured from London to Halifax, warranted with convoy from Portsmouth; she sailed from London, but when she reached Portsmouth, the convoy had failed. It was adjudged, that the under-writer should return the premium, deducting the value of the risk from London to Portsmouth; which in this case was one-half per cent.; for the voyage was divisible in its nature, viz. from London to Portsmouth, and from thence to Halifax.

"But where it is not so divisible, there shall be no apportionment of the premium."

* P. 84.
Lilly v.
Ewer.
Doug. 72.

* As where the insurance was on a ship at 5 per cent. 2 per cent. to be returned if she sailed with convoy: she sailed with convoy only to a certain latitude. This it was held, should not make the insurer return part of the premium; for the contract was entire and for the whole voyage.

2. "And though the contract may consist of many parts, yet it may be entire; and the premium in such case shall not be apportioned."

Bermon v.
Wood-
bridge.
Doug.
751.

As where a ship was insured "at and from Honfleur to Angola, during her stay there, and thence to Domingo and home;" premium 1 l. It was held, that though there were several parts of this voyage, yet that the contract was entire; and if the risk was once begun, that there should be no apportionment of the premium.

Tyrie v.
Fletcher.
Cowp.
666.

So when the insurance was on a ship "at and from London to any port for 12 months." This was held to be one entire contract, and that the premium should not be considered as so much a month: so that the ship being taken before the 12 months expired, that there should be no apportionment of the premium.

These are the principal cases of express contracts which are objects of this action. I shall subjoin a few other cases reducible to no general head.

1. A person

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1. A person may recover against the former incumbent Jones v. Hill. 268. who has been guilty of dilapidations, * the sum expended by him in necessary repairs, by action of *assumpsit*. * P. 85.

2. If the sheriff levies money on a *fi. fa.* and does not pay it over to the plaintiff; he may recover it in this action as levied to his use. Williams v. Croy. Salk. 12.

3. This action will lie to recover the value of a masquerade or such like ticket, at the suit of the person who passed it. Longchamp v. Kenny. Dougl. 132.

—*Note*, the objection to this action was that it should be *trouver*. Menetone v. Athawes. 3 Burr. 1592.

4. So where a shipwright had repaired a ship, which by accident was burnt while in dock, yet was he allowed to recover in this action the amount of the repairs. Atkyns v. Hill. Cowp. 284.

5. This action lies against an executor or administrator having sufficient assets, to recover a *legacy*. Hawkes v. Saunders. Ibid. S. P. South Sea Company v. Duncomb. 12 Stra. 919.

6th. *Assumpsit* will lie for money had and received, *though the lender of the money has taken a pledge for his security*: for he shall be presumed to trust to the personal security of the borrower as well as to the pledge, unless there appears a special agreement to discharge the person.

Having thus considered what will maintain this action, I shall now proceed to consider

2dly. What Contracts will not support an *Assumpsit*.

1st. " This action being founded either on an express agreement or an implied undertaking; whenever the presumption of such * contract or undertaking is excluded, * P. 86. " as where it appears that money for which the action was brought was paid *without the consent* of the person sued; " there this action will not lie."

As in this case. Where it appeared to be the custom of the parishes of *St. Vedast* and *St. Michael le Quern*, to elect a sexton jointly, and each parish to pay a moiety of the salary. *St. Vedast's* elected a sexton without the concurrence of *St. Michael's*, who therefore elected a separate sexton for themselves. *St. Vedast's* paid to their sexton the *whole salary*; and then brought an action against *St. Michael's* for the moiety: It was adjudged that it could not be maintained, for the money was paid clearly *against the consent* of the parish of *St. Vedast's*; and so there could be no undertaking implied. Stokes v. Lewis. Mic. 26 G. 3. B. R. Term Rep. 20.

So where after a recovery in ejectment, lessor of the plaintiff brought *assumpsit* for the mesne profits; the action was held not to lie: for that plaintiff having by his ejectment considered defendant as a trespasser; he should not afterward be allowed to consider that as a contract, which he before chose to consider as a tort. Birch v. Wright. Mic. 27 G. 3. Term Rep. 378.

So when in *assumpsit* for goods sold, the evidence was, that the plaintiff's servant had sold the goods to defendant, who was to give him half price, which the servant was to keep to his own use: It was adjudged, that plaintiff could not Thorp v. Howe. Per Holt. Salk. MSS. Buller N. P. not 130.

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not maintain this action, as there was clearly no contract or undertaking to plaintiff himself.

* P. 87. * 2d. "A mere *voluntary courtesy* will not support an *assumpsit*."

Hob. 106.

"And that shall be deemed a voluntary courtesy *which has been undertaken without a prospect of certain recompence.*"

Osborn v.

Governors

of Guy's

Hospital.

1 Stra. 728.

As where plaintiff had done much business for Mr. Guy (who bequeathed all his possessions to the hospital) and had done it in contemplation of a legacy from him. But being disappointed, after Guy's death, he brought this action on a *quantum meruit* for his former trouble; when it was adjudged, that it would not lie, the business having been done not with a view to immediate or certain recompence, but with a view to a legacy.

"But if there was *any request* made by defendant, there the courtesy or benefit shall be presumed and construed to be not voluntary, but done in pursuance of the request, and this action will lie."

Lampleigh

v. Braith-

waite, Hob.

105.

As where plaintiff declared, that defendant having killed a man, requested plaintiff to labour to procure for him a pardon, for which he promised him 100*l.* which plaintiff having performed, it was adjudged that the action well lay, as arising from the request of the defendant.

Grieffly v.

Lowther.

Hob. 10.

* P. 88.

So where defendant's testator made a promise to plaintiff that if she would use her influence with her daughter, and induce her to marry him, that he would give her 100*l.* She did so, and the marriage took effect, it * was adjudged a sufficient consideration to uphold the action.

"But though a request has been made, yet if it was in consequence of the *offer, advice or inducement of the other party*, it will not support this action."

Aldsworth's

case. Read-

ing Ass.

1749.

Buller N P.

As where in *assumpsit* for money had and received, the defendant gave in evidence, that he had paid 20*l.* to the secretary of a foreign ambassador for a protection for the plaintiff, and also charged his costs and expences in procuring it. The judge directed the jury, that in case they believed, that plaintiff himself had applied to the defendant to get this protection, to allow the sum paid for it; but that in case they believed, that the advice to get such protection, came from the defendant, then to allow him nothing, and the jury found for the plaintiff without any allowance.

"And it should seem that *any thing done in the course of a person's business or employment*, shall not be deemed a voluntary courtesy, but the foundation of a contract."

Jermyn v.

Lucas,

Per Twif-

den Nor-

folk, 1662.

Trials p.

pais 181.

For where in *indebitatus assumpsit* for carrying herrings, plaintiff gave in evidence, that he was a porter at Yarmouth, and when the herring ships came in, he went (of his own head) and carried such a quantity to the defendant's house. It was held to be good evidence in support of the action.

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* 3d. " This action will not lie where the *consideration* on * P. 89.
" which it is founded is an *illegal* act."

As where plaintiff gave to defendant 20s. in consideration of which, he undertook to beat J. S. out of such a close, or to pay 40s. He did not do it, whereupon plaintiff brought *assumpsit* for the 40s. and the action was adjudged not to lie, the consideration being an unlawful act. Allen v. Rescous, 9 Lev. 174.

So where two boxed for a wager of five guineas, on *assumpsit* for that sum brought by the winner, the action was held not to lie, the act being an unlawful one. Webb v. Bishop, Gloucester Ass. 1731.

" And though the consideration be *but in part unlawful*, yet it shall vitiate the action, which is founded in the consideration taken together." Buller N.P.

For where in consideration that plaintiff (who was a special bailiff) would let a person whom he had arrested for debt, go at large; and of two shillings then paid to defendant, he undertook to pay the whole debt, on *assumpsit* brought for the money, it was adjudged not to lie, for the promise being to the same effect as an obligation which would be void by *stat. 23 H. 6.* the promise shall be so too: and though it is coupled with another consideration, of two shillings, yet it being void as to part, it is void as to the whole. Fetherstone v. Hutchinson. Cro. Eliz. 199.

* " On this ground, money won at gaming would not be recoverable." But there is this exception, * P. 90.

That where the money was *lent* to play with, but there was no security as by bond or note, but merely parol, this was held not a case within the statute; for there not being the word *contract* in the statute, the parliament might think there could be no great harm in a parol contract, where the credit was not likely to run high, and that therefore the lender might recover. Barjeau v. Walmsley, 2 Stra. 1249.

" Though the plaintiff in this action has not been a party to the illegal transaction, yet where the *assumpsit* has arisen from it, he cannot recover."

For where defendant promised the plaintiff two per cent. on the sum, a purchaser to be procured by the plaintiff would give for defendant's place of surveyor of baggage in the port of London. Plaintiff did procure him a purchaser, who gave him 1200*l.* and then brought his action for 24*l.* When it was adjudged that the sale of offices being prohibited by *stat. 5 & 6 Ed. 6. c. 16.* that the sale was an illegal transaction, and that the *assumpsit* founded on it was void; and so defendant had judgment. Stackpoole v. Earle, 2 Will. 133.

" But where the transaction is not in itself unlawful, no subsequent illegal use of the subject of it shall destroy the *assumpsit*."

* As where plaintiffs sold tea to defendant abroad, which they delivered at Dunkirk, though this tea was for the purpose of being smuggled into England, and that known to the plaintiffs at the time, yet they not being concerned in the smuggling, * P. 91. Holman v. Johnson, Cowp. 341.

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smuggling, and it being a fair sale as to them, they were allowed to recover the price of the tea in *England*.

"However, where a person has been ignorantly induced by the false representations of another, to do an illegal act from which a damage arises to him, he shall recover those damages from the person who induced him to act in such manner, on his promise of indemnifying him."

Fletcher v.
Harcott v.
Hutt. 55.

For where defendant pretending that he had arrested a person on a commission of rebellion, brought him to the plaintiff's house, and promised to save him harmless on consideration of his keeping such person for one night safe as a prisoner; this person recovered damages against the plaintiff for false imprisonment, and plaintiff recovered them against the defendant.

4th. "Upon similar grounds *assumpsit* will not lie to recover money promised for doing that which it was the parties duty to do without reward, for it is extortion and illegal."

Stotefbury
v. Smith,
2 Burr. 924.
2 Black.
Rep. 204.
S. C.

As where plaintiff who was a special bailiff, declared, that having arrested one *Stanton*, in consideration that he would take defendant and another as bail for *Stanton*, defendant promised * to pay him six guineas and a half, for which this action was brought; it was held not to lie, it being the duty of the bailiff to take proper bail without any recompence or reward whatever.

* P. 92.

Bridge v.
Cage, Cro.
Jac. 103.

So where an executor sued out an *elegit*, and a stranger in consideration that the sheriff would forthwith execute it, and of sixpence paid to him by the sheriff, promised to pay him 60*l.* upon which the sheriff executed the writ, and brought his action for the money: it was adjudged that no action lay, as being a consideration against law; for the sheriff is bound to do his duty without reward, and this 60*l.* is no discharge of fees due to the sheriff, being given by a stranger, and not expressed to be in consideration of them.

Rogers v.
Reeves,
Mich. 27
Geo. 3.
Term. Rep.
418.

But even where the act of the officer is not extortion, as where the undertaking is for the appearance of the person arrested at the return of the writ, or to save the officer harmless, yet this action will not lie; for the statute 23 H. 6. having pointed out the mode of discharge, viz. *by bond*, that alone is legal and must be pursued, and a simple contract undertaking cannot be supported.

5th. "Wherever the consideration of the *assumpsit* arises from a fraudulent transaction, this action will not lie."

Willis v.
Baldwin
Dougl. 433.

For where plaintiffs were sutlers to four regiments at camp, and were to furnish eight horses for each regiment, for the forage of which government gave them an allowance, which was to be furnished by defendant: an agreement, that plaintiffs should not take the whole of the allowance, but that defendant should retain part, and give a certain allowance of nine pence halfpenny per ration to the plaintiffs

* P. 93.

for

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for every ration left, was held to be void, and the money not recoverable; for it was a cheat and fraud on government who paid for the whole.

6th. "So this action being an equitable one, cannot be supported where the *assumpsit* arises from an *unconscientious demand*."

As where plaintiff lent to defendant a sum of money for the purpose of making a purchase of goods, upon defendant's note, payable on demand, and the plaintiff was to have half the profits on the re-sale of the things purchased, the purchase was made, and within two hours after, plaintiff made a demand of payment of the note, and brought his action for the interest and half the profits of the goods beside. It was adjudged that as the note bore interest from the demand, to have interest from that time, and half the profits too, seemed to be usurious, the demand being made immediately; but if not usurious, that it was unconscientious; for the agreement was for half the profits *in lieu of interest*; and defendant had judgment. Jestons v. Brooke, Cowp. 793.

7th. "And so likewise if the consideration is a *frivolous* or *groundless one*, or if there is *no consideration at all*, this action will not lie, for *ex nudo pacto non oritur actio*."

As if *A.* promises to *B.* a sum of money on consideration that *B.* would make him an estate * at will, it is a void promise to support this action, for *B.* may instantly determine his will. 1 Roll. Ab. 23. P. 94.

So where plaintiff declared, that whereas the defendant's father had taken the profits of certain lands to which plaintiff had title, and for which he had filed his bill in Chancery against defendant, and that in consideration that plaintiff would withdraw his bill, defendant undertook to repay the profits so taken, and for which he now brought his action: It was resolved that it could not be maintained, *for there was no consideration*, as the bill in Chancery might have been an unjust one, upon which plaintiff could have recovered nothing, and beside that, the son was not to answer for the father's wrong. Tooley v. Windham, Cro. Eliz. 206.

"Upon this ground a promise of any thing for a *service already performed*, without view to reward, is void. Though where the service had been done *at the request* of another; it shall be good to support this action." Beauchamp v. Neggin, Cro. Eliz. 282.

But a promise to a *servant* in consideration of past services has been held to be good. Franklin v. Braddell, Hutt. 84.

And for the same reason promises to pay merely in consideration of *unspecified forbearance* are void, and will not uphold this action. For the forbearance might be but for an hour, which would be a forbearance, and yet would be an inadequate and frivolous consideration. Lutwich v. Hussy, Cro. Eliz. 19.

Therefore where the consideration is forbearance, the time of forbearance should be a convenient one, and set forth, to be left to the jury. Treford v. Holmes, Hutt. 108.

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* P. 95. * 8th, *Assumpsit* will not lie where the debt for which the action is brought, is due by specialty. For the specialty ought to be declared on; therefore it is necessary always in the action to set out, for what cause the debt became due, or it will be a sufficient reason to arrest the judgment.

Woodford
v. Deacon,
Cro. Jac.
206. Cro.
Ja. 213.
S. P.

Bulstrode
v. Gilborne,
2 Stra.
1027.

Therefore where by deed under hand and seal, plaintiff had appointed defendant his deputy, as prothonotary to the palace court, and defendant entered into articles to account. Plaintiff brought *assumpsit* for the sums received by defendant in the office; and the action was held not to lie; for defendant being bound by deed, plaintiff had a remedy against him of an higher nature; as here an action of covenant.

Wilkin v.
Wilkin,
Salk. 9.

Though where there is an *express promise to account*, this action will lie; but plaintiff shall not in this action be allowed to go into the particulars of the account, but shall confine himself merely to the damage he has sustained from not accounting according to promise.

Poulter v.
Cornwall,
Salk. 9.

And therefore in *assumpsit* grounded on a promise to account, misapplication or breach of trust must always be laid in the declaration; for if a man receives money to a special purpose, it is not to be demanded as a duty until he has refused to apply it according to his trust.

Fenner v.
Meares,
2 Black.
Rep. 1269.

* P. 96.

However, where a person gave a respondentia bond for a sum of money, and bound himself by an indorsement on the bond, that in * case the obligee chose to assign the bond to any person, that he would pay the assignee the whole sum without any deduction. This was adjudged to be an undertaking to any assignee to pay the money, and that *indebitatus assumpsit* would therefore lie for the money, by the person to whom the bond was assigned, as founded on the undertaking and not on the bond.

9th. "These are cases in which on account of the consideration being bad, the plaintiff cannot recover, but in those cases if the party had paid the money on such consideration, he shall not be allowed to recover it back."

Browning
v. Morris,
Cowp. 790.

1. As where a lottery-office keeper paid money on an insurance policy, which insurance was against act of parliament. Having brought his action to recover it back, it was resolved, that the insurance being illegal, the court would not assist him in the recovery of what he had voluntarily paid, and defendant had judgment.

Per Lord
Mansfield,
2 Burr.
1112.

So if a person pays a debt which has been barred by the statute of limitations: or contracted during his infancy, and not for necessities: or to the extent of principal and interest on an usurious contract: or money fairly lost at play. In none of these cases can the party recover it back; for it was paid through a motive of honour and honesty, and the defendant may therefore retain it with a safe conscience, and therefore the law will not compel him to refund it.

"But

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"But where money has been paid on an illegal consideration, that is to induce an * illegal act, if the service is not * P. 97. performed, plaintiff shall recover back the money."

As where a man gave money to a custom-house officer to Quot. Anon. in goods, the goods were seized, and the person recovered 1 Lord Raym. 89. back his money again.

10th. "Though the person who has received any money from another, is not legally intitled to keep it, *if it depends on a question of right, which cannot be completely tried in this form of action*, but may in another; *assumpsit* cannot be maintained for it."

As where defendant had taken and impounded plaintiff's title as damage feasant, plaintiff claimed a right of common, but paid the money charged for the damage, and then sought *assumpsit* to recover it back, for the purpose of trying the right; the action was adjudged not to lie; 1st. Because at upon the general issue defendant would not be apprized of the point to which to apply his defence; and 2dly, That the right would not be decided, for it would not appear afterward on the face of the record. The action should have been trespass or replevin in which the right would come in question, and appear on the face of the record.

So where it was brought, to recover back money given as difference in the exchange of two horses, where it afterward appeared that one of them was unsound. The action was held not to lie, for the warranty was the point to be tried, which * P. 98. could not be in this action.

So it will not lie as for money had and received, to recover back in any of the public funds; for stock is not money, and the remedy should be by bill in Chancery. This case was to recover back 500l. India stock transferred to defendant by the bankrupt after an act of bankruptcy committed.

11. These are the most material grounds of this action. It is however to be observed, that ~~as~~ this action is founded on promises, it is enacted by the *statute of Frauds* 29 Car.

c. 3. That no action can be maintained on a bare promise without a note in writing to prove it, in the following cases:

"No executor shall be charged in any deficiency or damage out of his own estate. 2. No person shall be charged to answer for the debt or default of another person: 3. Nor any one be charged on any agreement in consideration of marriage: 4. Nor upon any agreement for the sale of lands, tenements or hereditaments. 5. Nor upon any agreement whatever which is not to be carried into execution within a year from the making thereof, unless there be a memorandum of the contract, agreement, or undertaking, signed by the parties or their agents properly authorised."

Upon these clauses in the statute, these decisions following have taken place.

As to the 1st. I find no determination.

C.

As

Quot. Anon.
1 Lord
Raym. 89.

Lindon v.
Hooper,
Cowp. 414.

Tower v.
Wells,
Cowp. 819.
* P. 98.

Nightingale
assignee of
Metivier v.
Devisme.
5 Burr. 2509.
2 Black.
Rep. 684.
S. C.

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* P. 99.

Fourkermire v. Darnell.
1 Salk. 27.

* As to the 2d. the rule is, "That if the defendant comes only in aid of the other who obtains the goods, so that there is a remedy against both, according to their distinct engagements, that that is a collateral undertaking, and void without a note in writing; but where the whole credit is given to the defendant, so that the other is but as his servant, and there is no remedy against him, That that is not a collateral but an *original undertaking*; in which case a note in writing is not necessary."

Williams v. Leper,
3 Burr.
1886.

As where plaintiff was lessor to one *Taylor*, who owed him 45*l.* for rent, *Taylor* assigned over all his effects for the benefit of his other creditors, who appointed defendant as their broker. He advertised a sale, and on the morning of it plaintiff came to make a distress; whereupon defendant promised that if he would desist from distraining, that he would pay him the whole of the rent. For this rent the action was brought, and defendant pleaded the statute of frauds, as an undertaking for the debt of another, and no memorandum in writing. But it was adjudged that plaintiff having a prior lien on the goods in the hands of the defendant, that they were the fund charged, and to pay out of this fund was an original undertaking by the defendant himself.

"But wherever the person undertaking is *jointly interested* with others, though they receive the benefit of his undertaking, no note in writing is there necessary; for the undertaking should be *solely* for the debt of another, which here is not the case."

* P. 100.

Stephens v. Squire,
5 Mod. 213.
Comb. 362.

* As where an action was brought against defendant and two others, for appearing for plaintiff without a warrant, and defendant promised that if plaintiff would not prosecute his action, that he would pay him 1*ol.* and costs. A note in writing in this case was held not necessary, *it not being a promise solely for the debt of another*, the defendant being himself originally liable, (3 Burr. 1888.) But *per Holt*, if *A.* says do not proceed against *B.* for a debt, and I will give you 1*ol.* this would be within the statute.

"For it should seem, that a debt should be absolutely due to the person to whom the undertaking is made, to make a note in writing necessary. It is not sufficient, that plaintiff has given up, at the request of the defendant, an action certain demand against another person."

Rothery v.

c.
Trin. 21 Geo.
2. C. B.
Bull. N. P.
282.

As where in consideration, that plaintiff would not sue *A. B.* for a debt which he owed him, defendant promised to pay the money due, *viz.* 4*l.* in a week. This was adjudged to be clearly within the statute, and void without a note in writing; for it was for the debt of another, and still subsisting notwithstanding the defendant's promise, and so was collateral.

Read. v. Nash,
1 Will. 305.

But in this case, where the plaintiff's testator had brought an action against one *Johnson*, for an assault, in consideration that he would withdraw the record, and not proceed to trial

the defendant *Nash* promised to pay him 50*l.* On action brought for this 50*l.* defendant pleaded *the statute of frauds; *P.101. but it was adjudged not to be within it, for *Johnson was not a debtor*; the cause was not tried, there might have been a verdict for him, so that *never being liable to any certain debt*, this was an original undertaking by the defendant, and not for the debt of another.

This is confirmed by this case; for here an action being brought by plaintiff against one *Vickers* for a certain sum of money defendant in consideration that plaintiff would stay his action, undertook to pay the money; and it was held clearly that there should have been a note in writing; for the undertaking was for a *subsisting debt of another*. Fifth v. Hutchinson. 2 Will. 94.

“So *wherever a person is bound by law to do any act for another, or to procure it to be done, if it is done, though without the request of such person*, a subsequent promise by him to pay is good without a note in writing.”

As where a pauper was taken ill, and an apothecary sent for without the knowledge of the overseers of the poor, who attended and cured her, and after the cure the overseers promised to pay him by parol. It was adjudged sufficient to charge them; for the overseers are bound to provide for the care of the poor, and so shall be deemed originally liable. Watson v. Turner & al. Trin. 7 G. 3. in Exchequer. Buller N. P. 281.

However it seems to be impossible to draw any general rule to decide in what cases an undertaker for the debt of another shall be charged, and in what not, and it must therefore be left to the jury to decide to whom the original credit was given, for on that point all the cases turn. Buller N. P. 281.

* 3. The third case under the statute requiring a note in writing is “*On agreements in consideration of marriage*.” *P.102.

As to which it has been settled;

“That *promises to marry*, are not within the statute. For the statute relates only to promises or contracts in consideration of marriage, as to pay money, make a settlement, &c.” Cock v. Baker, 1 Stra. 34.

As where a father wrote a letter signifying his consent that his daughter should marry *T. E.* and that he would give her 500*l.* On a further treaty he receded from this proposal, but sometime afterward he declared that he would agree to what he had promised in his first letter. It was adjudged that this last declaration had set up the first letter, and was a good promise in writing under the statute. Bird v. Blosse, 2 Vent. 361.

So where defendant before his marriage with the plaintiff, promised her that she should enjoy all her own estates to her separate use, and writings were ordered to be drawn accordingly. After marriage defendant promised by letter as before. But upon a bill filed against him to compel a performance, he pleaded the statute of frauds, and it was held to be a good bar, as this was clearly an agreement in consideration of marriage, and there was no note in writing before the marriage. Lady Montacute v. Sir J. Maxwell her husband. 1 P. Wms. 618.

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4th. The fourth case under the statute requiring a note in writing is, “on agreements for the sale of lands or any interest in them.”

*P.103.

Per Treby

Anon.

1 Ld. Raym. 182.

* “ This clause is confined to the sale of things real, as the lands themselves, and so does not extend to the sale of timber growing on the land, which is a mere chattel, and so may be sold by parol.”

Cases under this head fall more properly to the jurisdiction of the court of chancery, as they occur on the ground of a bill being filed to compel a sale and complete a purchase. I shall insert however two cases.

Clerk v.

Wright,

1 Atk. 12.

Hawkins v.

Holmes.

1 P. Wms.

770.

1. A letter from the feller of an estate mentioning his intention to sell the estate, but *not the terms*, is not such a note in writing as is required by the statute.

2. Plaintiff agreed to give defendant 600*l.* for an house, and by consent an attorney drew a draft of a conveyance, which was sent to defendant to peruse; he made several alterations in it, and returned it to the plaintiff to get it ingrossed. Afterwards refusing to perfect the conveyance, plaintiff filed his bill. When it was resolved that this was not such a signing or memorandum in writing as was good under the statute.

5th, The fifth case in which a note in writing is required is on agreements *not to be performed within a year.*

3 Burr.

1281.

*P.104.

As to this the rule is, “That where the agreement depends upon a contingency, and it does not appear but the contingency will * happen within the year; nor does it appear from the agreement that it is to be performed after the year; there a note in writing is *not necessary*, because the contingency may happen within the year, and so the agreement be performed within that time: but where it appears from the whole tenor of the agreement, that it is to be performed *after the year*; there an agreement in writing is required under the statute.

Fenton v.

Emblers.

3 Burr. 1278.

1 Black.

Rep. 353.

S. C.

As where by parol defendant's testator promised the plaintiff, that if she would come to live with him as house-keeper, that he would give her 8*l. per annum*, and *leave her by his will an annuity of 16*l.* a year.* She went and lived with him till his death; when he having failed to make for her the provision promised, she brought her action against the executor: when it was ruled, on defendant's pleading the statute, that as this depended on a contingency, as testator might have died within the year, no note in writing was required, and plaintiff recovered the value of the annuity.

Anon.

Comb. 463.

Anon.

Salk. 280.

So where the promise was to pay 100*l.* on defendant's marriage, a note in writing was not held to be necessary.

So where it was to pay on the return of a ship: for both these contingencies might happen within the year.

I shall now, in pursuance of my original division, proceed to

A S S U M P S I T.

* 2d. ASSUMPSIT CONSIDERED, WITH REFERENCE TO THE PERSON. *P. 105.

As to which

1. "It is a general rule, that no person can maintain this action on an agreement to which he is not a party; for such would seem to be a species of maintenance." Jordan v. Jordan. Cro. Eliz. 369.

For where one *Hardy* being indebted to the plaintiff, defendant undertook to pay *Hardy's* debt to the plaintiff, provided *Hardy* would assign to defendant, an interest which he had in a certain house; and avers that *Hardy* was ready to assign: It was resolved, that the plaintiff could not maintain this action against the defendant, he being a stranger to the consideration; as the agreement was between *Hardy* and defendant, and no contract subsisted between defendant and *him*. Crow. v. Rogers. 1 Stra. 592.

So where one *Parrie* was indebted both to plaintiff and defendant, and a stranger was indebted to *Parrie*; defendant undertook to pay *Parrie's* debt to the plaintiff, on condition that *Parrie* would suffer him to sue the stranger: he did so and recovered; and then plaintiff sued him and had judgment, which was arrested: for the plaintiff was a stranger to the consideration. Bourne v. Mason. 1 Vent. 6.

"However, where the consideration is a *provision for, or to enure to the advantage of a child*, this rule has admitted of exceptions."

* For where defendant's father, who was also father to the plaintiff's wife, was about to cut down 1000*l.* worth of timber off an estate which was to descend to the defendant, as a portion for the daughter: defendant then promised his father, that *he* would pay 1000*l.* to his sister, provided the father would not sell the timber. In an action for this sum after the father's death plaintiff had a verdict: it was moved in arrest of judgment, that the action could only have been brought by the father, or his executors, as party to the agreement, and not by the daughter who was a stranger to it: but it was adjudged, that it being a provision for, and a kind of debt to the daughter, that *she* should maintain this action though a mere stranger could not. *P. 106. Dutton v. Poole. 1 Vent. 318. 332. Sir T. Jones 103. Rookwood's case. Cro. Eliz. 163. S. P.

And a still stronger case was cited in the case from *Vent. 6.* above. Where a physician was promised a sum of money for himself, and another for his daughter, provided he performed a certain cure: It was held, that the nearness of relation gave the daughter the benefit of the consideration performed by her father; and that she might maintain *assumpsit* for the money.

"And upon this ground it should seem, that in *assumpsit* upon promises, general declarations are not sufficient; they should be made to the person who brings the action."

For where upon a discourse between the father of *A.* and *B.* in relation to a marriage between *A.* and the daughter of *B.* *B.* said, that he would give 100*l.* to whoever would marry *his*

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*P.107. * *his daughter with his consent.* A. did marry her with his consent and brought his action for the money : when it was adjudged, that it would not lie on those general declarations, as they amounted not to a promise to the plaintiff himself ; though this would now be clearly bad on the statute of frauds.

2d. Such are the general principles. As to particulars,
1st. In the case of *Factors*.

Gonzalez
v. Sladen.
Tr. 1 Ann.
Salk. MSS.
Buller N.P.
130.

1st. If a factor sell the goods of a person beyond sea, he may maintain an action in his own name for the price ; for the promise shall be presumed to be made to him : And so if he buys goods, the feller may have an action against *him*, for the credit shall be presumed to be given to him : and particularly because it is for the benefit of trade.

Buller N. P.
130.
2Stra. 1182.

This seems clearly to be the case, where there is no interposition of the owner of the goods sold, as to whom, it seems, " That the factor's sale creates a contract between the buyer and the owner of the goods ; and therefore if the factor sells for payment at a future day, if the owner gives notice to the buyer to pay him and not the factor, the buyer is not justified in paying the factor." This was the doctrine delivered by the chief justice in the case of *Alderton* and *Schrimshire* following : but the jury found against his direction ; their verdict was to the following effect.

*P.108. * That where by the usage of trade, the factor sells the goods *Alderton v. at his own risque* ; that is, at all events answerable to the owner ; in such case the owner cannot arrest the money due on the sale of his goods in the hands of the buyer : for the factor, not the buyer, is debtor to the owner of the goods.

Escot v.
Milward.
Sittings
after Mic.
24 G. 3.

But this case seems now not law ; for in this case the doctrine before laid down by the chief justice in *Alderton v. Schrimshire*, was recognized and admitted. The case was this. In the month of *June* 1783, a cargo of wheat was consigned to the plaintiffs from *Ostend*, and they employed one *Farrer* as their factor to sell it. It was proved, that the factors in this trade have a del credere commission beside factorage, and never, except in case of the failure of the factor, make the purchaser's names known to the owners. On the 9th of *June* *Farrer* sold 200 quarters of this wheat to the defendant. On the 16th of *June*, *Farrer* handed over to plaintiff the wheat then remaining in his hands, and the names of those who had purchased the rest ; and among others that of the defendant *Milward*. On the 20th of the same month *Farrer* stooped, and compounded with his creditors, who executed to him a deed to that purpose. On the 21st of *June*, plaintiff delivered to defendant a bill of parcels of the wheat sold by *Farrer*, and demanded payment by his acceptance of a bill to the amount at a month's date. Defendant refused and insisted that he had a right to set it off against a debt due by *Farrer* to him. Plaintiff brought his action, and the doctrine of the chief justice in *Schrimshire v. Alderton*,

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Alderton, was laid * down to the jury by Just. *Buller*, as the *P.109.
clear law on the subject; and the jury found accordingly, for
the plaintiff.

2. And every factor ought to sell for ready money, unless *Anon.*
the usage of trade is otherwise; and if he sells upon trust, *Caf. K. B.*
without usage to warrant him, he alone is chargeable in case *514.*
of a loss: but if the usage be to give credit, then in case he *Per Holt*
sells to a person in good credit, if such person fails, the fac- *C. J.*
tor is discharged: but it is otherwise, though the usage to
sell is so, if he sells to a person notoriously discredited at the
time of the sale; for then in case of a loss he is liable: and
so he should sell in market overt, or there is no change of
property.

3. As a factor has a lien upon goods consigned to him for *Zinck v.*
his own demands; and as also, if goods consigned to him as *Waller.*
factor remain in specie, they are not subject to his bankrupt- *2 Black.*
cy; so where bills have been remitted to a factor for a special *Rep. 1154.*
purpose, if not disposed of or paid away at the time of his
bankruptcy, they shall still be considered as belonging to the
principal, and be recovered in this action; but subject how-
ever to any lien the factor himself may have on them.

2. The next is the case of

Agents or Receivers.

1st. An action for money had and received will not lie *Sadlier v.*
against a known agent, or receiver, for money paid *Evans.*
voluntarily to such agent for the use of the *principal. For it would *4 Burr. 1985.*
be unjust to suffer such an action to proceed, and to leave him **P.110.*
to be defended or deserted as the principal thought fit; and
especially if the action is brought for the purpose of trying
any right of the principal.

For where a man receives money for another as his agent, *Staplefield*
under a pretence of right (*Ex. gr.* for title): the court will *v. Yewd.*
not suffer the principal's right to be tried in an action against *Trin. 27*
the collector, if the defendant can shew the least colour of *G. 2. Per*
right in his principal: as in this case, by having been some *Lee C. J.*
time in possession. *Buller N.P.*
133.

2. So where money has been paid to an agent or receiver *Buller v.*
by mistake; he shall not be liable if he has paid it over to his *Harrison.*
principal; for he should not suffer for another's mistake; but *Cowp. 566.*
the payer should resort to the principal himself: but if he
has not paid it over to his principal, but has it in his hands
or only given credit for it to his principal in his books, or on
an account between them; in these cases, he shall be perso-
nally liable.

3. The next is the case of the

Masters and Owners of Ships.

1. "The master of a ship may bind his owners to any
contract which is for the benefit of the ship."

As

A S S U M P S I T.

Yates v. Hall. Mic. 26G. 3. Term. Rep. 73.
 *P. III. As where the ship was captured and ransomed, and the master prevailed on one of the seamen to become an hostage, and promised him the *wages he then had, (4l. a month) for the time he should remain with the enemy, till the ransom was paid: this being for the benefit of the ship, was adjudged to charge the owners; and the sailor recovered for the whole time he was in the custody of the enemy.

2d. *As to Repairs done to the Ship.*

Watkinson v. Barnardiston. 2 P. Wms. 367.
 1. If they are done *at home*, there is no lien on the ship itself, but the owners must be personally sued: but if the repairs are done *abroad*, by the maritime law the master may hypothecate the ship's bottom.

Garnham v. Bennett. 2 Stra. 816.
 2. The person who repairs a ship has his election, either to sue the master who employs him, or the owners; but if he undertakes it on a special promise from either, the other is discharged.

“ But where no such agreement appears, both are subject: and no private agreement between the master and owners, shall deprive a person who has a charge against the ship for repairs, from suing either party.”

Rich. v. Coe. Cowp. 636.
 For where the owners of a ship *leased her for years to the master*, under covenants, giving him the sole disposal of her, for his own sole benefit, *he undertaking to keep her in repair during the term*; the owners were notwithstanding held to be liable for repairs done to the ship during the term, and necessities furnished to her, by order of the master, though they were unknown at the time to the plaintiff who furnished them: but if the plaintiff had had notice of the contract between the master and owners, it might be a ground to absolve the owners.

Cowp. 639. “ But the master is liable only *on his contract* and no further.”

Farmer v. Davis. Hil. 26G. 3. Term Rep.
 He therefore is not liable to be sued for necessities furnished to the ship *before the time he became master* of her; for there there is no contract.

3. “ And so much is the interest of the master considered only as that of a servant, and the whole property in the owners.”

Stevenson v. Mortimer. Cowp. 805.
 That where a custom-house officer had exacted exorbitant fees from the master of a vessel; an action for money had and received was adjudged to lie against the officer at the suit of the owners.

3d. *In the Case of Seamens Wages.*

“ Freight is the mother of wages, therefore in case a loss happens to the ship, no wages are recoverable; that is, the whole voyage must be performed, or the sailors shall not be entitled to any wages, for the ship is only entitled to freight on delivery of the cargo.”

There

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* Therefore where the plaintiff was engaged as a sailor on a voyage from *Barnstable to Portugal or Spain taking in a cargo of fish at Newfoundland*, and the ship was taken soon after she had sailed from *Newfoundland*; it was contended, that there were two distinct voyages, one to *Newfoundland*, the other from it to *Spain*; and that therefore the sailors were entitled to wages for the voyage to *Newfoundland*. But it was resolved, that the voyage was entire, for on the delivery of the cargo the ship is entitled to freight, and therefore in this case that no wages were due, the ship being taken before she had reached the discharging port.

" And on this ground, where no freight is earning by the ship, the mariners have no title to wages."

Therefore *while a ship is lading or unlading* the sailors are not entitled to wages, unless there is a special agreement to that effect, to allow wages during that time; in which case it shall be good.

" And the case is the same of *Letters of Marque or Privateers*, for the voyage or cruize must be performed, or no wages are due to the mariners."

Therefore where the plaintiff had engaged on board a Letter of Marque on a cruize, at the rate of *5l. per month*, and a share of the prize money; they took a prize, and the plaintiff was put on board her as prize master, and got safe to *England*; but the ship was afterwards taken on her cruize: It was adjudged, that tho' he was entitled to a share of the prize-money, yet that he had no claim to wages, on account of the capture of the ship.

4th. The next case of contracts I shall consider, are those made by

Servants.

1. A man shall be bound by the contracts made by his servant, *as far as he gives him authority* to buy and sell for him; but his act shall not bind the master, unless he acts within his authority.

2. " Where credit is given to a servant on account of his master or employer, he is not personally liable."

As where defendant was governor of *Quebec*, and in that capacity contracted for stores upon government account, which were furnished by the plaintiff: It was adjudged, that the credit being given to government only through the defendant, as a servant to government; that he was not personally liable to an action for their amount.

3. If a master once sends his servant to get goods for him on trust, for which the master afterwards pays; if the servant afterwards fraudulently takes up goods from the same person, which he converts to his own use; the master is liable; for, by paying the first debt, he gave the servant a credit, and ought to be charged.

" But

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*P. 115.
Kendal v.
Andrews.
Sitt. Easter
Term.
28 G. 3.
B. R.

* " But if the master never had any previous dealing with a tradesman, but the tradesman's dealings have all been with the servant, whom the master has regularly paid; in that case the master shall not be charged." As here, where the action was for oats and hay furnished to defendant's horses, but plaintiff had had no dealings with the master, but with the coachman, whom the master paid monthly: the plaintiff never applied to the master during the time, and the demand was of a year's standing.

5th. The next case I shall consider, is that of

Partners.

Hoare v.
Dawes & al.
Dougl. 356.

To make a person liable as a partner, there must be an agreement to share in all risques of profit or loss. And if many employ a common agent (as a broker) for a particular purpose, who makes a joint purchase (as here a lot of tea at the India sales), this shall not make them partners, so that they can be sued as such.

" It is essential therefore, to make a person subject as a partner, that he is interested in the profits; that is, that the advantage that he derives from the trade is casual, as depending on these profits; for if it is certain and defined, he is not a partner."

Grace v.
Smith.
3 Black.
Rep. 993.
*P. 116.

As here, where defendant had been partner with one Robinson, but the partnership being dissolved, defendant agreed to let a sum of * 4000*l.* remain in the trade at legal interest for seven years, and received besides an annuity of 300*l.* per ann. for the same time; all of which was secured by Robinson's bond. It was held that this should not make defendant a partner and subject to Robinson's contracts; for he had no concern with the business, and the annuity and interest was certain and independent of the profits.

Bloxham v.
Pell, Sit-
tings Hill.
Term.
1775. quot
Black. Rep.
992.

But where defendant in this action had been partner with one Brooke, and they agreed to separate, and Brooke agreed to give him his bond for 2485*l.* with interest, which had been brought by the defendant into trade, and an annuity of 200*l.* for seven years, if Brooke so long lived, as in lieu of the profits of the trade, and defendant had at all times liberty to inspect Brooke's books. Defendant was adjudged to be a partner and liable; for the charge has reference to the profits, it was casual as depending on Brooke's life, and his right to inspect the books was that of a partner.

Leglife v.
Champante,
2 Sira. 820.

2d. Where there is a partnership demand, all the partners should join in the action, for the contract and undertaking is joint; and if in such case one partner only brings the action, the defendant may take advantage of it at the trial, and nonsuit the plaintiff; for the contract is not the same; but in the case of a tort, this must be pleaded in abatement.

But

A S S U M P S I T.

But if an action of *Assumpsit* is brought *against one partner without joining the other*, defendant must take advantage of it by pleading that matter in abatement; for if he was allowed to give it in evidence, and so non-suit * the plaintiff, it would be endless litigation, unless plaintiff knew all the partners. But when defendant pleads in abatement, he sets out all his partners, and the plaintiff knows against whom to proceed. Rice v. Shute. 5 Burr. 2611. 2 Black. Rep. 695. * P. 117.

† 3d. "For all contracts with partners are joint and several, and every partner is liable to pay the whole; and in what proportions the others are to contribute is a matter merely among themselves; plaintiff may however, bring his action against one, but *he* may compel, by a plea in abatement, plaintiff to join them all: and if he brings his action against all; yet he may take out execution against one only." Abbott v. Smith. 2 Black. Rep. 947. S. C. † Per Lord Mansfield, 5 Burr. 2613. 2 Black. Rep. 696.

But if one partner is out of the kingdom, and not amenable to the process of the court, defendant may proceed singly against the other. Darwent v. Walton. 2 Atk. 510.

6th. The next class of contracts I shall consider with reference to the person, are those arising in the case of

Bankrupts.

1. The assignees standing in the place of the bankrupt are invested with all the rights of property of the bankrupt, and bring actions for it and declare as *assignees*, for all demands due on the bankrupt's *contracts before the act of bankruptcy*. But for all demands on *contracts* entered into by the bankrupt *after an act of bankruptcy* committed, they may bring the action *in their own names*, for after his bankruptcy the bankrupt is to be considered but as their agent. 3 Will. 307. Evans v. Mann, Cowp. 570.

* "For whatever property of the bankrupt is in the hands of others, after an act of bankruptcy committed, or comes to him before his certificate is allowed, belongs to the assignees, and may be recovered by this action." * P. 118.

Therefore where a legacy had been given to a bankrupt, and testator died when the certificate had been signed by four-fifths in number and value of his creditors, and by the commissioners, but before it had been confirmed and allowed by the Chancellor. This was adjudged to belong to the assignees. Tudway v. Bourne, 2 Burr. 716.

Assumpsit therefore also lies to recover back money, which has been levied by the sheriff under a *fieri facias* against the goods of the bankrupt, issued after he had committed an act of bankruptcy, against the plaintiff at whose suit the *f. fa.* was sued out. The idea formerly was, that the assignees were obliged to proceed as for the tort in taking the goods. Kitchin v. Campbell, 3 Will. 304.

But by statute 19 Geo. 2. c. 2. "If money on bills of exchange or in the course of business, is *bona fide* paid to a fair creditor, though after a secret act of bankruptcy committed, it shall not be liable to be refunded; provided such creditor had no notice prior to the receiving of his debt, that the debtor was insolvent."

" This

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*P. 119. " This statute confines strictly to the terms of it all disposition of his property * by the bankrupt, so that after an act of bankruptcy committed, he can only dispose of his property in the regular course of trade, as *by paying for goods when delivered, or bills of exchange, or notes when regularly due.*"

Vernon
Assignee v.
Hall, M ch.
19 Geo. 3.
2 Term.
Rep. 639.

For where the act of bankruptcy was committed on the 2d of May, 1785, but unknown to the defendant or any of the creditors: some months prior to the bankruptcy, the defendant had sold an estate to one *Utterston*, who paid him for it by a bill of exchange, drawn on the bankrupt and payable the 7th of *February* of the same year. Defendant applied for payment when it became due to the bankrupt, but was told that it was not then convenient to pay it, but that if he would hold the bill that he should be allowed interest. He did so till the 22d of May, 1785; when he demanded payment and received the money, which was now recovered back by this action, the court being clearly of opinion that it was not a payment made in the course of business, and so was not protected by the statute.

2. As against the Assignees of a Bankrupt.

Brown
Executor v.
Pullen,
Doug. 392.

Where plaintiff's testator proved a debt against the bankrupt estate, to which defendant was assignee, the executor may maintain *assumpsit* against the assignees under an order for a *dividend*, and the proceedings before the commissioners shall be conclusive evidence of the debt. And for that reason the assignees shall not be allowed to plead a set-off; for as the commissioners have a power of setting off * mutual debts, *the debt proved and allowed shall be deemed the balance.*

*P. 120.

7th. The next is the case of

Executors.

Norwood v.
Read,
Plowd. 181.

Assumpsit lies against an executor on a promise by the testator. So he may also maintain this action on a promise made to the testator.

8th. The last class of contracts which I shall consider as in relation to the person, are those made by the

Wife,

And see how far the husband is affected by them.

1 Sid. 120.

1. " *During the cohabitation of the husband and wife*, he is answerable for all debts contracted by her *for necessities* from the implied credit arising from cohabitation, but for " nothing further."

Manby v.
Scott, 2 Lev.
4.

And these necessities are to be judged of *with reference to the estate of the husband and of his degree or rank in life*. For high degree may have a low estate. And of this matter the jury are to judge, and to find accordingly, so they are also to find the assent as well as cohabitation of the husband.

" But the husband is not even liable for necessities, if the " debt has been contracted under illegal circumstances."

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As where defendant's wife was in custody in execution, on a charge of subornation of perjury, * and of course should have been *in prison*, but was suffered to remain at the house of the plaintiff who kept a *spunging house* within the Rules, who furnished her with necessaries, for which this action was brought, which was adjudged for defendant. For her being in plaintiff's house was illegal, she not being such a prisoner as was entitled to the benefit of the Rules, and in such case the law will not raise an implied promise to charge the husband.

*P. 121.
Fowler v.
Dinley,
2 Stra.
1122.

"And as the husband is charged by the wife's contract, on his implied consent to provide her with necessaries during cohabitation, *therefore where he shews his dissent* he shall not be liable, as by a *general notice to all tradesmen not to trust the wife*, which seems sufficient."

Buller N. P.
135.

As where in an action against the husband for goods sold and delivered to the wife during cohabitation, it was proved that she was very extravagant, and used to take up cloaths to a large amount, and pawn them at an under value, and that *the husband had given notice to the tradesman* who was plaintiff in this action *not to trust her further*, the husband was held not to be liable for goods taken up after that notice of his express dissent.

Etherington
v. Parrott,
Salk. 118.

And in this case the Ch. J. *Holt* further held, "that if a woman takes up goods (as silks) for the purpose of making them into cloaths, and pawns them before they are so made up, he is not liable, for they never came to his use: otherwise if made up and worn, and then pawned."

* "But the wife can in no case *borrow money* even to pay for necessaries, as she might squander it."

*P. 122.

Therefore this action will not lie for money lent to the wife, for she can make no contract; but if *it be at the special instance and request of the husband*, it is good; for it is then a loan to him.

1 P. Wms.
183. Ste-
phenson v.
Hardy,
3 Will. 388.

"So in the case of goods."

For where plaintiff declared, for meat, &c. found by the plaintiff at the defendant's request, and on evidence it appeared to be found for the defendant's wife at his request during his absence. On a case reserved it was holden, "That a delivery to the wife at the husband's request, is a delivery to the husband," and that so he is chargeable. But this is during cohabitation. *Vide post. Ramsden v. Ambrose.*

Ross v.
Noel Pasch.
31 Geo. 2.
C. B. Bull.
N. P. 136.

And where an husband gave his wife the foul disease, and the debt was for her cure, it was held necessary, and that he was liable.

Harris v.
Lee 1 P.
Wms. 132.

2d. "Though the wife be ever so improper in her conduct, yet while she continues with her husband, he is bound to find her necessaries, and pay for them; for he took her for better, for worse: *So if he runs away or turns her away*, he is in like manner liable, for he still sends with her credit for her reasonable expences."

Robinson v.
Grenfold,
Salk. 119.

As

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Bolton v. Prentice, 2 Stra. 1214.
***P. 123.** As where defendant and his wife lodged at the plaintiff's house, who was a milliner, during which time she furnished the wife with money * and things without the husband's knowledge; he paid for them, but forbid the plaintiff to trust her further. The husband and wife cohabited together for a year after, when he turned her out of doors, and declared he would not maintain her. In this distress she applied to the plaintiff, who furnished her with necessaries according to her degree, for which this action was brought: when it was resolved, that the causeless turning her away gave her a general credit, and that he being the wrong-doer could not give such a prohibition to furnish her.

Per Lord Mansfield. And *Note*, That if a man cohabits with a woman, allows her to assume his name and passes her to the world for his wife, though in fact he is not married to her; yet is he liable to her contracts for necessaries. And therefore *ne unques accouple in loyal matrimonie* is a bad plea in an action on the case for a debt of the wife; and on demurrer, plaintiff would have judgment: it is good only in dower or an appeal.
Hudson v. Brent. ‡ 3. "But if the wife elopes and goes away from her husband; when such separation becomes notorious, whoever gives her credit does it at his peril: for the husband is not liable unless he takes her again; for then it is as if a woman had eloped at common law, she thereby lost her dower: but if the husband received her again, her right of dower was revived."
Sittings after Hil. 36 G. 3. "And though the tradesman who furnishes her with necessaries has no notice of her elopement, yet he shall not recover against the husband."
Norwood v. Stevenfon. † So it seems to make no difference whether the elopement is adulterous or not; for in no case shall the husband be charged. But if the elopement be not adulterous, Lord Raymond seem'd in this case to think, that the husband's refusal to take her again might, from that time, excuse the elopement.
Trin. 11 & 12 G. 2. "So neither shall the wife herself be charged for goods furnished to her during the elopement and absence from her husband."
B. R. Buller N. P. 136. For where she was sued, as a feme sole for a carriage furnished to her by plaintiff, during her elopement; on the ground of her having eloped from her husband and living separate: it was adjudged against the plaintiff; for she was a feme covert still as to every right, but dower, and not to that, if adultery was proved, and so could not be sued alone.
† Robin-son v. Greinold. And *Note*, That where husband and wife live separate, if an action is brought for necessaries or the maintenance of the wife, it should not be laid as for necessaries furnished to him; but the special matter should be stated; for otherwise a recovery in that action would not be a bar to a special one brought for the maintenance of the wife.
Salk. 119.

***P. 124.** **Morris v. Martyn.** 1 Stra. 647.
1 Stra. 706. **S. P.** † **Child v. Hardyman** 2 Stra. 875.

Hatchet v. Baddeley. 2 Black. Rep. 1079.

Ramsden v. Ambrose. 1 Stra. 127.
Harris v. Collins. Trin. 12 G. 1.
Buller N. P. 136.

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4th. "But where the husband and wife *part by consent, and she has a separate maintenance* * from the husband; she shall * **P. 125.**
"in all cases be subject to her own debts."

This has been decided and settled in both these cases, where Ringstead v. Lady Landborough. Mic. 23 G. 3. & Hil. 23 G. 3. and so were liable to their own debts, was on demurrer holden G. 3. to be good; and that the husband's residence on the spot or in Ireland made no difference. Corbet v. Poelnitz. Mic. 26 G. 3. B. R.

"And it seems therefore, that a personal knowledge of the separation of the husband and wife is not necessary in order Term Rep. 5. S. P.
"to discharge the husband; for if it be publicly known in
"the place where the parties live, it is sufficient; for the
"notification need not be in the place where the wife afterwards runs in debt."

And accordingly in this case, where the husband lived in Todd v. Chichester, where he had parted from his wife, and the action Stokes. was for drugs furnished to his wife in London: It being proved, Salk. 116. that the separation had taken place five years before, during Caf. K. B. 244. S. C. which time she had had a separate maintenance, the husband was held not to be liable.

"But when the husband and wife live apart, the wife must
"have a separate maintenance *from the husband* in order to
"discharge him."

* Therefore where the wife had a *pension* during pleasure: * **P. 126.**
It was held, that this should not be deemed such a separate Thompson v. Harvey. 4 Burr. 2078. maintenance or alimony, as should discharge the husband from a demand against him for necessaries, where he had turned her out of doors.

"On the same foundation as that of separate maintenance,
"wherein the wife is considered as sole, *wherever the husband*
"*is in circumstances not to be sued, as not amenable to the process*
"*of the court, the wife shall be sued as sole.*"

As where the husband of a feme covert is an *alien enemy*, Derry v. Dutcheff of Massareene. Salk. 116. or has *abjured the realm*; in such case the wife is chargeable as a feme sole. Co. Litt. 132. b. 133. a. 1 Ld. Raym. 147. S. C.

† So where *the husband of a woman had been transported*, the wife was held to be suable as sole. Sparrow v. Carruthers. Per J. Yates. 2 Black. Rep. 1197.

And lastly, by the custom of *London* a feme covert carrying on business in *London* on her own account, is liable to her own debts, independant of her husband.

2. So far is the husband subject to the debts and contracts of the wife. We shall now enquire, *how far he is benefited by her contracts.*

1st. "Whatever the wife earns during coverture belongs to
"the husband, and he shall bring an action for it in his
"own name."

* Husband and wife brought an action against the defendant for work done for him *by the wife*. And on demurrer defendant Salk. 114. *** P. 127.** Buckley v. Collier.

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dant had judgment, for the husband should have brought the action alone; for the action being a general *indebitatus assumpsit*, no promise shall be supposed to have been made to the wife: and as the wife's debts would fall against the husband's estate, so the profits of her labour shall go to him or his executor.

2 Black. Rep. 1239. "But where there is an express promise to the wife, the husband may assent, to make it a joint contract; and then she may join."

Prat. & Ux. v. Taylor. Cro. Eliz. 61. As where any act is done by the wife (as the delivery of money) and the promise is made to her, though done without authority from the husband; yet he may after assent to it and they may join in the action.

Brassford v. Bucking-ham. Cro. Jac. 205. So where the consideration was, that if the wife would cure defendant of a wound, that he would pay her 10*l*. It was held, that the cause of action arising from the labour and skill of the wife, and the promise being made to her, that she might join her husband in the action.

Bidgood v. Way & Ux. 2 Black. Rep. 1236. Therefore in all actions of *assumpsit* wherein the husband and wife join, *the interest of the wife must be stated*; for otherwise, as the wife can make no contract and the husband has the benefit of all made by her, the *assumpsit* shall be deemed to be only to the husband, unless her interest specially appears. As in the cases just stated; so *where she has a separate property: So if the cause of action existed before her marriage*; in which cases she should join.

* P. 128. * But where the wife married a second husband, the first being living, but he not being privy to it; it was held by C. J. Strutville--- 1 Stra. 80. *Parker* that she should be deemed to be as a servant to the second husband, and that so he should have what she earned, during cohabitation with him.

Warr v. Huntley. Salk. 118. 2d. Where an ordinary working man married a woman of like condition, and after cohabitation for some time left her, and during his absence the wife worked, and the action was brought for her diet: it was held, that the money she earned should go to keep her.

5. "Having now considered the several foundations of this action, and the persons by and against whom it may be maintained; it now remains to consider

3d. THE PLEADINGS AND EVIDENCE.

1st. Of the Pleadings on the Part of the Plaintiff.

Before I treat directly of the pleadings, I shall premise,

"That where the debt is to arise from several acts to be performed at different times, each performance is a distinct duty, and the action may then be brought.

Barker v. Sutton. Norfolk Ass. 1662. Per Hale. Trialsp. Pais 186. For when in this case plaintiff sold 60 comb of barley to the defendant, which was to be delivered before *Christmas*, and plaintiff delivered 50 comb before that time, and then brought his action for the amount of that: it was resolved, that

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that though the agreement was entire, yet that every delivery *P. 129.
made a several contract, which would maintain this action.

So where the contract was to pay 20*l.* by 10*l.* at Mich. Milles v.
1631, and 10*l.* at Mich. 1632; it was adjudged, that plain- Milles.
tiff might maintain his action immediately, on the first pay- Cro. Car.
ment becoming due. 175. 241

I now proceed to the pleadings.

1st. "Where the *assumpsit* is founded on an agreement,
in which *something is previously to be performed by the plain-
tiff*; on condition of which defendant undertakes to pay:
it is necessary for the plaintiff in his declaration to aver
either a *general performance of his part*, or *that he is ready
to do it*, and also a notice, by request, to defendant.

For where plaintiff declared, that on the compromise of a Collins v.
suit, defendant undertook to pay him a certain sum of money Gibbs.
in consideration of his executing to defendant a general re- 2 Burr. 899.
lease. In *assumpsit* for the money and judgment by default,
judgment was arrested, for the reason, that the plaintiff had
not averred, *that he had executed the release, or was ready to
do it*, which was necessary to support the action; the release
being a condition precedent: but it was further held, that
the want of the averment would be *helped by a verdict*; there-
fore the defendant should take the advantage of the omission,
either by demurrer; or if the judgment was by default, by ar-
rest of judgment.

"And so notice and request to defendant should be averred." *P. 130.

"For there can be no default in the defendant till he has
had notice of the performance of plaintiff's part."

In *assumpsit*, plaintiff declared on an agreement by defen- Holmes v.
dant to pay him for one load of wood at the same rate he sold Twiss.
the rest of it. On a writ of error defendant had judgment, Hob. 51.
because there was no averment, that plaintiff had given de-
fendant notice of the sale and price of the rest.

So where the *assumpsit* was to pay to plaintiff so much on Richards v.
his coming into *Somersetshire*; judgment was arrested after a Carvamel.
verdict, because plaintiff had not averred in his declaration Hob. 68.
notice of his coming, and a request to defendant to pay.

And in such case a *special request must be averred*; for the Wallis v.
general averment in all declarations of *licet sapius requisitus* Scot.
will be insufficient; that is, will not be considered as suffi- 1 Stra. 88.
cient notice.

So that the rule to this effect is precise; viz. That

"Where the defendant is chargeable on a collateral Silman v.
matter and not on a mere debt, there ought to be a request King.
precisely alledged in point of time, place, &c. But where Cro. Jac.
the *assumpsit* is for a preceding debt, which was due before; 183. Hill v.
when the general allegation of * "*licet sapius requisitus* is Wade. Cro.
sufficient; for the bringing the action is a request." Jac. 523.
*P. 131.

F

Therefore

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Frampton
v. Coulson.
1 Wils. 33.

Therefore in declaring on a note of hand no request is necessary, for it acknowledges a debt, and the bringing the action is a request.

— v.
Henning.
Cro. Jac.
432.

But where notice is not to come from the plaintiff but from a collateral matter which may be within defendant's own knowledge, (as to pay as much as *J. S.* does) there no notice or request is required from plaintiff.

Morris v.
Kirke.
Cro. Eliz.
73.

"So in all cases where money is to be paid on an executory consideration, the plaintiff should set out the day when and place, because it is traversable."

Sexton v.
Miles.
Salk. 22.
Show. 50.
S. C.

Therefore in *assumpsit* where plaintiff declared, that in consideration plaintiff would deliver, &c. defendant undertook to pay, &c. and in fact says, that he did deliver; but does not alledge a *place where*: the defendant demurred for want of a venue, and the declaration was held ill; for a consideration executory is traversable; and therefore the place necessary to be shewn.

2. "Where the action is brought on *mutual promises*, they must be both made at the same time, or else it will be *nudum pactum*, and so no action will lie: And when they are to be performed at the same time; plaintiff in such case need not aver performance."

*P. 132.
Nicholas v.
Rainbred.
Hob. 88.

* *Assumpsit* on an agreement. Where in consideration that plaintiff agreed to deliver to defendant a cow, he promised to give the plaintiff 50 shillings. Plaintiff need not aver the delivery of the cow, for it is promise for promise.

Martindale
v. Fisher.
1 Wils. 88.

So where the *assumpsit* laid was that plaintiff had agreed to deliver to defendant 3 yards one-eighth of cloth; and defendant agreed on a certain contingency to pay for the same 5*l.* but if the contingency did not happen that he was to pay nothing. The contingency did happen, and on action brought plaintiff had a verdict; when it was moved in arrest of judgment, that plaintiff had not averred the delivery of the cloth; but it was resolved, that this being promise for promise, no such averment was necessary: but if it had been that defendant undertook to pay, if plaintiff would deliver so much cloth, there the condition would be precedent, and an averment of performance necessary.

3d. "So again, where the plaintiff's action is to arise from some precedent act to be done by himself; he should aver and shew *his right* to do such act, and also *his performance* as far as he could. For otherwise he might recover for a consideration which he could not perform."

Luxton v.
Robinson.
Doug. 598.

In *assumpsit* on an agreement to forfeit a deposit; and also another sum if defendant did not accept possession of certain premises from the plaintiff, and also pay for certain fixtures * therein at a valuation: it was adjudged on special demurrer that plaintiff's declaration was ill, because he had

*P. 133.

not

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not *shewn his right* to the premises, and that the valuation was actually made.

“ And for the same reason if the plaintiff *avers performance*, he must also *shew how performed*, that the court may judge if the performance is sufficient to entitle him to the action.”

For where plaintiff declared, that being entitled to a Gregory v. rent-charge out of lands of which defendant had the rever- Nevill.
sion; that defendant promised, that if he would relinquish Cro. Eliz.
the rent that he would pay him 30*l.* and plaintiff avers, that 292.
he did so relinquish the rent, and brings his action for the 30*l.* and after verdict for the plaintiff, judgment was arrested, for that plaintiff in his declaration had not *shewn how he had relinquished the rent*; for it might have been by words which would have been no discharge.

So where defendant promised to deliver an horse to the plaintiff, on plaintiff's becoming bound to him by writing obligatory for Austen v.
11*l.* plaintiff in his declaration only averred *his offer* to be- Gervas.
come bound, and had a verdict: but judgment was arrested, Hob. 69-77.
for plaintiff should have averred, *a tender of the bond ready sealed to defendant, and also the sum he was bound in*, for the court to judge of the performance, which here he had not done. *P. 134.

And if the plaintiff declares on two considerations he must Laneret v.
aver the performance of both; * for the *assumpsit* on the part of Rivett.
the defendant shall be presumed to be founded on both con- Cro. Jac.
siderations taken together. 503.

4th. “ In declaring in *assumpsit* it is always necessary to Woodford
“ set out for *what the debt became due*, and not generally; v. Deacon.
“ that defendant being indebted, undertook to pay, &c. For Cro. Jac.
“ the debt might be due by specialty, in which case this 206.
“ action would not lie.” ante 95. Cooke v.
Samburne

† “ But if it sufficiently appears from the declaration, that i Sid. 182.
“ the debt is not due by specialty, as if it is *pro opere & labore* S. P.
“ generally without saying what work, it is good.” † Hibbart v.
Courthope.
‡ So if it be for *necessaries* furnished to a sick man without Carth. 276.
saying what necessaries, it is good: for such are simple con- † Cripps v.
tracts on the face of them. Bainton.

5th. “ In declaring in *assumpsit* for money lent and ad- 3 Bulst. 31.
“ vanced, it must always be *to defendant himself*.”

For where plaintiff declared for money lent by him to one Marriot v.
James Dalrymple, at the special instance and request of de- Lytser.
fendant, judgment was arrested, for the word *lent* is a tech- 2 Will. 141.
nical term, and imports a loan to *J. Dalrymple*; if so he is Butcher v.
the debtor, and therefore defendant cannot be charged. But Andrews.
it had been otherwise, had the plaintiff declared for money S. P.
delivered to such a person at the request of defendant; * for *P. 135.
then the loan had been to the defendant himself.

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Stephenfon v. Hardy. 3 Will. 388. But where plaintiff in this case declared for money lent to defendant's wife at his request; and it was attempted to arrest the judgment on the authority of the cases above, the court held, that a loan to the wife at the husband's request, was a loan to the husband himself, and plaintiff had judgment; for the husband and wife are but one person.

6th. "The breach assigned in the declaration should always follow the undertaking stated, or the plaintiff cannot have judgment."

Wright v. Johnson. 1 Vent. 64. In *assumpsit*, plaintiff declared that defendant undertook to deliver an horse of the plaintiff's in as good plight as he borrowed him; and the breach assigned was, that he had not delivered him at all. Defendant had judgment; for the breach was inconsistent with the undertaking.

Harman v. Owden. Salk. 140. 7th. In *assumpsit* to deliver on or before such a day, as the 5th of June, that defendant did not deliver on the 5th of June, is a good assignment of the breach, though defendant might have delivered it before that time: for defendant might, on *non assumpsit*, give a delivery before that day in evidence; and as defendant could not make a tender before that day, it shall not be presumed that plaintiff was there to receive it sooner.

*P. 136. * 8th. "If plaintiff in his declaration undertakes to recite a statute, and that statute is the ground of the action, and mis-recites it, it is fatal: for so the plaintiff would not prove his whole declaration, the statute being the first thing to be proved."

Rann v. Green. Cowp. 474. In *assumpsit* to recover 40 shillings due to plaintiff as vicar of Trinity parish Coventry, under an order made by the chancellor and the two chief justices, for the payment of tithes, in pursuance of a power given to them for that purpose by statute 4 & 5 Phil. & Mary, plaintiff in his declaration stated the statute to be the 4th of Phil. & Mary. For which variance, he was, on producing the statute, and it appearing to be the 4th & 5th Phil. & Mary, Non-suited.

9th. "In *assumpsit* the day of the promise laid in the declaration, is not material."

Cole v. Hawkins. 1 Stra. 21. Plaintiff in this action declared on promises to pay the 16th of Jan. 1706. Defendant pleaded *actio non accrevit infra sex annos*. Plaintiff replied, that a bill had been filed 23d Jan. 1714, and that the cause of action arose within six years before. Defendant demurred generally, and shewed for cause, a departure: for that if the *assumpsit* was within six years preceding the 23d of Jan. 1714, it would not be on the day laid in the declaration; viz. 16th of Jan. 1706, which is more than seven years, and so there was a departure in assigning a different day: but the demurrer was over-ruled, for this being a parol promise, the time alledged

is

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in the *declaration is only matter of form, not of substance ; so *P. 137.
that not being a departure in a material part, *there should have been a special demurrer for want of form*, not a general one.

So where plaintiff, who was a taylor, brought his action, Howard v. and six several promises were laid, *all upon the 16th of October*, Defendant pleaded *infra etatem* to all generally. Plaintiff replied as to *two* of the promises, that the defendant was at the time of making these of *full age* ; and as to the rest, that they were *pro necessario vestitu*. Defendant demurred, for that the promises being all laid on the same day, that it was repugnant, that he could not be at the same time of full and not of full age ; but it was held, that the time was a circumstance in no wise material, nor part of the issue ; that plaintiff is not tied to a precise day in his declaration, and if defendant force him to vary, it is no departure.

And so where the cause of action is to arise *on a request*, the day of the request is not material ; for it may be laid at one time in the declaration, and a request at another time given in evidence.

So where plaintiff declared on promises ; the breach was assigned on the 6th of *November*, and the declaration was of the same day, being the first of *Michaelmas* term : to this there was a special demurrer, for cause, that the declaration bore date before the cause of action ; the promise being laid the first day of the term and there being no fraction of a day allowed ; but *the demurrer was over-ruled ; for the first day of term is only to be reckoned from the time the court began to sit, and so the breach might precede it.

“ But where the day makes a part of the contract, and so is of substance, there assigning a different day in the replication would be a departure.”

As was the case here in an action on a promissory note, in which the day is material, and of substance. 2 *Stra.* 806. S. C.

9th. In *assumpsit* on an *in simul computasset*, the time and place should be laid where the account was settled, or it will be error ; for which in this case judgment was reversed.

10th. In declaring on a *bill of exchange* against the acceptor, it is sufficient in the declaration to alledge generally, *that he accepted it* without averring that it was in writing ; for such acceptance is only necessary to charge the drawer with costs and damages.

As by the customs of merchants an executor or administrator may indorse over a note or bill of exchange. If indorsee brings an action against the maker of a note, the shall not be called upon for a profert of the letters of administration, for they are in the indorser's hands, not in his.

11th. Plaintiff declared in *assumpsit* for goods sold and delivered, but omitted in his * declaration to say, “ In consideration of which the said *W.* undertook and faithfully promised,

Et c.”

Jemison.
Salk. 223.
Matthews v.
Spicer.
2 *Stra.* 806.
S. P.

King v.
Bray.
Sid. 68.

Pugh v. Ro-
binson.
Hil. 26 G. 2.
B. R.

*P. 138.

Stafford v.
Forcer.
quot. 1 *Stra.*
22.
Desborough
v. Kelly,
Lord Raym.
533.
Erskine v.
Murray,
2 *Stra.* 817.

Rawlin-
son v.
Stone.
3 *Will.* 1.

*P. 139.
Lee v. Welsh
2 *Stra.* 793.

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5c." After a judgment by default it was reversed upon error, there being no promise laid in the declaration.

1 Raym. 450. 12. In declaring under the statute of frauds, plaintiff need not, in his declaration, shew any note in writing; but it will be sufficient for him to produce it on trial.

Truman v. Hurst. Mich. 26 Geo. 3. B. R. Term Rep. 40. 13th. In *assumpsit* against an infant, one count in the declaration was an account stated, and there was a general verdict; judgment was arrested. For such count is bad as against an infant, who is not to be presumed to be competent to enter into an account.

Rigg v. Wilmer, 1 Stra. 697. 14. In *assumpsit* by the assignee of a bankrupt, the declaration stated, that defendant was indebted to the bankrupt, and being so indebted assumed to pay him, without any *assumpsit* to the plaintiff through the whole declaration. It was held well on demurrer; being like the case of an executor who always declares on a promise to testator. *Vide Evans v. Manie, ante 117.*

Dean v. Crane, Salk. 28. 2 Ld. Raym. 1101. S. C. 15. Plaintiff declared as executor on a promise to the testator, and on *non assumpsit infra sex annos* to the testator, proved a promise made to himself within that time; it was held not to be admitted in evidence in support of the declaration, but that plaintiff should have declared on a promise to himself.

*P. 140. Rogers v. Cooke, Salk. 10. Hooker v. Quilter, 1 Will. 171. S. P. *Bigg v. Malin, Hutt. 27. Cro. Eliz. 59. S. P. Legate v. Pinchion, Cro. Jac. 293. *So plaintiff cannot join in the same action a demand due to himself, and another as executor or administrator; for the costs to be recovered are entire, and he can never discover how much he is to have as administrator or executor, and how much as his own.

"And in declaring against an executor on a promise by his testator, it is not necessary to set out in the declaration that defendant has assets; for if he has not, it should lie on him to discharge himself by his plea; and if he pleads *non-assumpsit* he has lost that advantage."

2. Of the EVIDENCE on the Part of the PLAINTIFF.

1. "It was formerly held that where there had been a *special agreement*, plaintiff ought to declare on it; for he should not be allowed to give it in evidence on a general *indebitatus assumpsit*. *Sed 2. Mod. Prae.*"

Knight v. Cox, per Pemberton. C. J. at Suffex 1682. Buller N. P. 153. For where in *indebitatus assumpsit* for goods sold, defendant pleaded *non assumpsit*, and gave in evidence that he became insolvent, and that the plaintiff and his other creditors gave him a letter of licence to recover the debts due to him, which he had done, and that they received four shillings in the pound, and the plaintiff and the other creditors then signed a release. The plaintiff pretended and would then have given in evidence, that the defendant had given him a note promising to pay the entire debt, if he would sign the release, * and produced the note.

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note. But it was held that the release was good evidence for the defendant on *non assumpsit*, and that plaintiff should have declared on the special promise.

"And where plaintiff declares on such a special *assumpsit* he ought to prove the contract stated in his declaration expressly as laid."

Plaintiff declared on an agreement by defendant, to deliver him good merchandizable corn. Proof of an agreement to deliver good corn of the second sort, was held not to support the declaration. Anon.
1 Ld. Raym.
735. per
Holt.

So where the agreement declared on was, to deliver to plaintiff stock on the 22d of August, and upon the trial the evidence produced from the broker's book, was to transfer on the opening; though the broker swore that the 22d of August and the opening were the same, yet it was held a variance, and plaintiff was nonsuited. Paynde v.
Hayes, 08.
Str. 74.
Buller N. P.
145.

So if the promise alledged be proved, yet if it appear to be made on a different consideration than that stated in plaintiff's declaration, or if it be proved to have been made on that consideration and another, it shall not support the declaration. King v.
Robinson.
Cro. Eliz. 79.

So where divers considerations are alledged, some good and sufficient, others idle and vain. If those which are good be proved, it is sufficient, though plaintiff fails in proof of the others. But if all the considerations alledged are good, all must be proved: for the promise *shall be deemed to be founded on all these considerations which are good and lawful, ante 133. Bradburn v.
Bradburn,
Cro. Jac.
149.

"But if plaintiff declares on a special agreement, and has also other general counts in his declaration, if he fails in proving the special agreement he may go into evidence on the general counts." Payne v.
Bacomb,
Dougl. 628.
Harris v.
Oke at Win-
chester.
1759.
Buller N. P.
139.

This point is now settled, notwithstanding some contrary resolutions, as *Weaver v. Burrows*, 1 *Str.* 648.

2dly. "So plaintiff's proof must correspond with his title, as laid in the declaration."

For where the action was for money had and received to the use of the plaintiff, and the evidence was, that the money had been received by the defendant on account of the plaintiff's wife, who was an executrix, plaintiff was non-suited: for the contract to pay was proved to be to the person in a different capacity from that declared on. Anon.
Salk. 282.

"So in *assumpsit* against several, a joint debt or contract must be proved; for otherwise the proof would not correspond with the declaration." Bull. N. P.
129.

"But where the person bringing the action has looked to the faith of several partners, who are in business together, and has relied on their joint credit, though but one only of the partners has acted, the other partners *shall be charged, unless they shew a disclaimer, and proof of the act of one shall charge them all." *P. 143.

Therefore

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v. *Layfield*
&c al'.
Salk. 292.

Therefore, where *Layfield* and the other defendants were bankers, and *Layfield* sold a lottery ticket in the *Double exchange* lottery (in which several bankers were trustees) to the plaintiff, and undertook to pay the prize arising from it, the other partners were held to be liable, no disclaimer appearing for the lottery having been conducted by bankers, the plaintiff appeared to be well grounded in looking to the joint credit of *Layfield's* partners.

Thom-
son v.
Spencer.
Pasch 8 Geo.
3.
Bull. N. P.
129

3d. "It was formerly the opinion that on a count of *infirmul computassent*, that plaintiff was obliged to prove the exact sum laid, but that idea is now exploded, and plaintiff may now recover part of the sum demanded, on this count as well as on any other."

Lincoln v.
Parr,
2 Keb. 781.

But the court will not admit any evidence of an account current, and unliquidated; for that would involve the court in a tedious examination. The account therefore must always be exhibited as an account stated.

4th. "One of the most usual counts in declaring in this action is for *goods sold and delivered*; as to which it is enacted "by statute 7 Jac. 1. c. 12. *That the Shop-book of a trader shall not be evidence after the year*; but it is not evidence within the year, except under particular circumstances, as where no better evidence can be had."

*P. 144.
Pitman v.
Maddox.
Salk. 690.

*As where it was proved, that the servant who made the entries was dead; proof of that and of his hand-writing to the entries, and that he was accustomed to make entries, was held to be good evidence, and that no other proof of the delivery was necessary: for it is similar to a witness's attestation to a bond.

Price v. Ld.
Torrington.
1 Salk. 285.

So where in an action for beer furnished to defendant, the evidence of the delivery was that, it was the usual way of the plaintiff's dealing, for the draymen to come every night to the clerk of the brewhouse and give an account of the beer delivered out; to which the draymen set their hands: this being proved, and that the drayman was dead, who had delivered the beer to the defendant, but that it was his hand-writing subscribed to the book; it was held to be sufficient evidence.

"But to charge the defendant by this sort of evidence, it must appear that the entry was made in the shop book by the person whose business it was; as in *Pitman v. Maddox*, ante, or actual proof be made of the signing by a person who saw it, as in the last case."

Clerk v.
Bedford.
Mic. 5 G. 2.
Buller N. P.
282.

For where plaintiff to prove the delivery of wine to the defendant, produced a book which belonged to his cooper, who was dead, but whose name was set to several articles, and a witness was ready to prove his hand-writing; Lord Raymond refused to admit it.

Anon.
Lord Raym.
745.

So a man's book of accounts is no evidence for him, though it may be against him, for it cannot be better evidence, than his own testimony, which is inadmissible.

*P. 145.

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5th. In a trial concerning the delivery of goods according to agreement; *the factor who made the agreement*, was admitted as a good witness; *though he was to have a shilling in the pound on the sale*: for he is a mere go-between the buyer and seller, and so may be a good witness for either, as having no interest more on one side than the other. Dixon v. Cowper. 3 Will. 40.

6th. In *assumpsit* against an executor, and *plene administravit* pleaded, the plaintiff must notwithstanding *prove his debt*, or he shall recover but one penny damages though there be assets; for the plea only admits the debt but not the quantity. Shelley's case. Salk. 296.

7th. "It is a general rule, that the wife shall not be admitted an evidence for or against her husband."

And therefore in an action for wages earned by the wife; *Hill v. Hill*, Ch. Jus. *Lee* refused to let the wife's confession of a receipt of 20*l.* be given in evidence. Hill v. Hill, 2 Stra. 1094.

"But to this there are some exceptions."

1st. "Where the husband was not concerned in the action, but *the evidence was collateral* to discharge the defendant by charging the husband."

As in an action against defendant for his wife's wedding-cloaths; the defence was, that the **goods* were furnished on the credit of the wife's father, and her mother was called to prove it, though it charged *her* husband. Williams v. Johnson. 1 Stra. 504. *P. 146.

2. So where the action was for nursing defendant's child; the Ch. Justice admitted the wife of the defendant's declarations of her agreement to pay 4*s.* a week, as evidence to charge the defendant: this being a matter usually transacted by women. Anon. 1 Stra. 527.

8th. "In this action *strong presumption*, if the best evidence that can be had, shall be admissible and good."

As in *assumpsit* on a policy of assurance. Proof that the ship has never been heard of will be good to prove a total loss. Green v. Brown. 2 Stra. 1199.

"Otherwise the best evidence to be had must always be given. And therefore in declaring on a note of hand, or bill of exchange, or such contract in writing; the note, bill or contract, must itself be produced in evidence: except the original be lost; in which case a copy is good evidence."

But where an original note has been lost and a copy is tendered in evidence, sufficient probability must be shewn to the court to satisfy them as well of the loss as that the original note was genuine, before plaintiff will be allowed to read it. Goodeir v. Lake. 1 Atk. 446.

So if a man destroys a thing intended to be evidence against him, a small matter will **supply* it: As where defendant tore his own note of hand; a sworn copy was admitted as good evidence. Per Holt. Mic. 10 G. 2. 1 Ld. Raym. 731.

6. I now proceed to the pleadings and evidence on the part of the defendant. *P. 147.

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1st. Of the PLEADINGS on the Part of the DEFENDANT.

1st. "The plea should always answer to the promise or
"undertaking as laid in the declaration."

Skinner v. Rebow. 2 Stra. 919. Therefore in *assumpsit* by the assignees of a bankrupt, defendant pleaded, that the cause of action did not accrue to the bankrupt within six years; and on demurrer it was held ill, for the plea does not answer to the promise laid, which is to the assignee, and it precludes the plaintiff from proving any promise made to himself.

Woodward v. Robinson. 2 Stra. 302. "So the plea must answer to every part of the declaration."
*For if the plea be pleaded to the whole promise, and is an answer but to a part; the whole plea is naught and plaintiff should demur. But when it is pleaded to and answers but to a part, it is a discontinuance. As in *assumpsit* on three several promises and the plea only goes to two of them, it is a discontinuance as to the third, and if it be a record of the same term, plaintiff may have judgment by *nihil dicit* for so much as is uncovered by the plea.

*P. 148. 2^d. "Where the promise is to arise from any consideration
Lampleigh v. Braithwaite. Hob. 105. "to be performed; when it is performed, defendant cannot traverse the consideration alone or *by itself*; for it is then incorporated and coupled with the promise: but where it is executory, the plaintiff cannot bring his action till the consideration is performed; and if plaintiff brings his action before the consideration is performed, defendant should traverse the performance and not the promise; for they are distinct in fact."

Cro. Jac. 483. "So defendant cannot plead in bar, that he revoked and countermanded his promise."

Howe v. Beech. 3 Lev. 244. Plaintiff declared that in consideration that he would solicit and conclude a certain business for defendant which he had with J. S. that he would pay, &c. but before that he had concluded it, that defendant had countermanded him after he had had great pains and trouble: it was adjudged, that he should recover in *assumpsit* the whole sum promised, and not be confined to a *quantum meruit*, for what he had done.

3^d. "Matters of law that do not go to the gift of the action, but to the discharge of it, must be pleaded: such as accord and satisfaction: The statute of limitations, &c."

1st, *Accord and satisfaction* is a good plea in *assumpsit*. But it must be performed at the time of the plea.

*P. 149. "In *assumpsit* defendant pleaded an accord between him and the plaintiff, to do several matters in bar of the demand, and aver'd the performance of part, and that he tendered the performance

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formance of the remainder. On demurrer, the plea was held to be ill, for accord should only be pleaded when executed ; for then only it is a satisfaction.

“ For a bare accord without satisfaction is no plea.”

Therefore where defendant pleaded, that his several creditors, one of whom was the plaintiff, had come to an agreement to accept a composition in lieu of their respective debts from him, to be paid within a reasonable time,” this was held to be no plea to this action for the whole demand : for it was a mere accord without satisfaction. But *per Buller* Just. If the defendant had assigned over all his effects to a trustee for his creditors in order to pay them all *pro rata* ; it had been a good bar.

2d. *Payment* is a good plea under this head of satisfaction : Vanhatton it was in this case demurred to, as amounting to the general issue ; but the demurrer was over-ruled : for it admits a good cause of action though discharged by a subsequent transaction.

So is payment of a lesser sum before the time ; but this must always be pleaded, for it is not a performance which destroys the being of a promise, but a collateral agreement that supplies the place of it. But such evidence may be given in mitigation of damages.

*“ And wherever accord and satisfaction is pleaded, it must appear to the court to be a reasonable and good satisfaction, and be accepted by the plaintiff as such ; such as a better security.” And so

A *bond* may be pleaded in bar of a *simple contract debt*.

2. “ The *statute of limitations* is the next plea in bar I shall consider. And this must always be pleaded, and cannot be given in evidence on the general issue : for the *assumpsit* goes to the preter tense.”

This plea is founded on statute 21 Jac. 1. c. 16. which enacts, “ that all actions of *assumpsit* must be brought within six years, from the cause of action accrued.”

I shall first enquire against what demands it runs,

1st. “ The statute of limitations runs against any demand so as to be a complete bar notwithstanding any mesne acts intervening, as the *bankruptcy*, *coverture*, of the parties.”

For where in *assumpsit* by the assignees of a bankrupt, and plea of *non assumpsit infra sex annos*, plaintiff replied, that six years were not elapsed at the time of the assignment. On demurrer defendant had judgment : for though the six years might not have elapsed at the time of the assignment, yet as they were elapsed at the time of bringing the action ; it was a good bar, for the time of limitation continued to run notwithstanding the bankruptcy and all mesne acts whatever.

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Renew v.
Acton.
Carth. 3.
Cheevely v.
Bond,
Show. 340.
*Oliver v.
Thomas.
3 Lev. 367.

2d. The statute of limitations runs also *against bills of exchange and promissory notes*; which must be sued for within six years, or the holder will be barred.

Cotes v.
Harris & al'.
Sittings at
G. Hall. Tr.
29 & 30 G. 2.

*3d. The statute is a good plea in bar to an action by an *attorney for his fees*; though insisted in this case that such demand was out of the statute, as the fees arose on a suit which was matter of record.

4th. "In the statute is an exception of *accounts current between merchants*, against which the statutes shall not run; that clause is fully explained by this case."

Wace v.
Wyburn.
Tr. 19 G. 3.
B. R.
Buller N. P.
149.

Defendants were executors of the executor of *W. W.* and to this action of *assumpsit* pleaded *non assumpserunt infra sex annos*. The plaintiff replied, that he had sued out a bill of *Middlesex* on the 3d of *June* 1755, 28 Geo. 2. and that the testator in his life-time had promised to pay the demand within six years before the time of suing out the writ. The *assumpsit* was founded on a bill, and the first *item* of it was in 1746 and all the *items*, except the last, were above six years standing before the bill of *Middlesex* sued out: It was contended for the plaintiffs, that this being an account current, and the last *item* within the time of limitation, that this should draw the former *items* out of the statute. But it was ruled by Just. *Denison*, that the clause in the statute about merchants accounts extended only to cases where there were mutual accounts and reciprocal demands between two persons: not to cases between a tradesman and his customers, for those are not merchants accounts, and he was therefore clearly of opinion, that the statute was a complete bar to every part of the demand of above six years standing.

*P. 152.

5th. "In the same statute is a saving of the right of *infants, feme covert, non compos, persons imprisoned or beyond seas*. So that the statute does not run against any demand that they may have against others, provided they bring their actions within six years after their disabilities removed."

Chandler v.
Vilett.
2 Saund.
120.

1. But though the rights of infants are so saved, yet may infants at any time, *during their minority*, bring their actions by their guardians and recover any demands due to themselves.

Rochtschilt
v. Leibman.
1 Stra. 836.

2. "So in the cases of persons beyond sea;" To *non assumpsit infra sex annos* pleaded on a bill of exchange by defendant; plaintiff replied, that he had been beyond sea until such a time when he brought his action, and held good: the principal point in this case was, whether this clause in the statute extended to actions of *assumpsit*, it being contended, that it was confined to actions for words: but it was held to be good.

*P. 153.

*This clause in the statute only extends to persons who are *actually beyond seas*."

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For where to *non assumpsit infra sex annos*, plaintiff King v. replied, that he was resident in foreign parts out of the Walker. kingdom of England; viz. at Glasgow in Scotland. The repli- 1 Black. cation was held ill on demurrer, for the exemption did not Rep. 286. extend to him, as Scotland was not a foreign part within the meaning of the statute.

Therefore a foreigner shall never be barred from bringing Strithorff v. his action from any length of time while out of the kingdom; Græme. for the statute does not begin to run till he has come into it; 3 Will. 145. though any of the persons who are under disability, may nevertheless during the time such disability exists, bring their action.

The plaintiff was therefore never barred in his action by reason of his own absence from the kingdom; but as it often happened that the defendant was out of the kingdom, and tho' he could not be sued, yet the time ran to bar any demand against him: it was therefore enacted by stat. 4 & 5 Ann. c. 16. "That where any persons against whom there is cause of action shall be beyond sea, at the time of such cause of action given or accrued, fallen or come, that the persons who shall have such cause of action shall have liberty to bring their action against them within such times as are limited for bringing the said action by stat. 21 Jac. 1. c. 16. after their return."

* 6th. In the case of *Executors*. If the six years be not *P. 154. elapsed at the time of the testator's death, if the executor Cawer v. takes out proper process within the year, it will save the bar James, by reason of the limitation; even though the six years within Tr. 15 G. 2. which the demand accrued be elapsed before process C. B. "sued out." And this by the equity of the 4th section of stat. Buller N.P. 21 Jac. which gives a year to commence a new action; in 150. case the first judgment has been arrested or reversed.

So if the executor brings an action, but dies before judgment Wilcocks and the six years run; his executor may notwithstanding bring v Huggins. his action; but he must bring it within one year after the 2 Stra. 907. death of his testator, unless he has been delayed by suits for the Fitzgib. 81. administration or such like cause.

It should seem that if an executor is out of the kingdom, Smith Exec. that the clause of the statute extends to him: but in all cases, of Cod v. if the plaintiff has been in the kingdom when the cause of ac- Hill. Exc. tion accrued, from that time the statute begins to run even of Clark. though he then departs from the kingdom; so that if he, (or 1 Will. 134. if he dies) his executor or administrator, does not bring the action within six years from the time of the cause of action first accrued, the statute is a complete bar.

"But where money of a person who has died intestate has Cary v. Ste- been received by any one, the statute shall not begin to phenson. "run from the time of receiving the money, for then no 2 Salk. 421. "one

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***P. 155.** " *one has a title to receive it : but it shall begin from the time of the administration granted.

2. " I shall now consider what will prevent the statute from running so as to be a bar to plaintiff's action.

Bland v. Haselrig. 1st. The first is a *promise to pay* the debt after the six years have elapsed," for this is a revival of the *assumpsit*, and no new consideration is required : for the plea admits a cause of action before six years.

Yea, Bart. As in *Assumpsit* on a promissory note, and *non assumpsit infra sex annos* pleaded : On the trial it appeared, that the defendant was surety in the note for J. S. and that six years were elapsed since the note was given ; but that upon demand within the six years, defendant said, " you know I had not any of the money myself, but I am willing to pay half of it." The court were of opinion, that this promise took it out of the statute. This is the same case with that of *Yea v. Fouraker* in *Burr.* 1099. In which the reporter says it was decided. That an *acknowledgment of the debt*, after the commencement of the action, takes it out of the statute of limitations.

" And a *conditional promise* to pay will take the demand out of the statute, as much as an express one."

Heyling v. Huskins. In *indebitatus assumpsit* for goods, and *non assumpsit infra sex annos* pleaded. Plaintiff gave * in evidence, that the goods were sold above six years ago ; and that defendant being requested to pay, denied that he had bought the goods ; but further said, " prove it and I will pay you ; " this promise, though conditional was held to bring the demand within the statute ; for defendant by such promise waived the benefit of the act, as much as by an express promise.

" But the promise must be a promise *to pay*."

Owen v. Woolley. In an action by an executor for money had and received to the use of testatrix, and *non assumpsit infra sex annos* pleaded : the evidence proved that defendant said, " I acknowledge the receipt of the money but testatrix gave it to me." Mr. Baron *Clive* directed the jury to find for the defendant : for such an acknowledgment could not amount to a promise to pay, when defendant insisted that he had a right to retain.

Bland v. Haselrig. " Where several are bound jointly and severally in a note or other undertaking, if a *joint* action is brought against all, and they plead the statute of limitations, proof of a promise by one within six years, will not support the action, even against him who made the promise." This case seems now not law

on the authority of the case of *Whitcomb v. Whiting*. For there, in *assumpsit* on a joint and several promissory note, in the action which was against one only, payment of interest by another of the drawers, was held a sufficient acknowledgment to take it out of the statute * as to all, and plaintiff recovered accordingly.

***P. 157.**

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Sed Q. If there may not be a difference, as the contract in *Ventris* might be only joint and not several.

2d. "The next mode by which the statute is prevented from becoming a bar, is by *having sued out process* out of some court before the six years elapsed."

1. A *latitat* sued out within six years shall be good to prevent the statute from running, though no bill of *Middlesex* preceding it, is shewn. So a *capias* is good without an original. *Hollister v. Coulson.* 1 Stra. 550.

2. "So though the writ sued out has been an *informal one*, it shall yet be sufficient." As where an attachment of privilege was sued out against an attorney, but was informal, from the circumstance of being made returnable on a general return: it was however held sufficient to prevent the demand from being barred by the statute. For the clause in the statute which permits plaintiff to bring a new action within a year, where the first judgment has been reversed, allows for informality, since it takes notice of suits stay'd for irregularity. *Metcalf v. Burrowes.* Buller N. P. 151. *Leadbeater v. Markland* 2 Black. Rep. 1131.

3. So if plaintiff has levied a plaint in *assumpsit* in an inferior court, it shall prevent the statute of limitations from running against him, if he avers in his declaration above that it is for the same cause of action. *Story v. Atkyns.* 2 Stra. 719.

* And if an action has been so commenced in an inferior court and defendant removes it by *habeas corpus* to the King's Bench; though the six years have elapsed before the removal, yet the statutes does not bar the action; for the commencement of it was within the time. *P. 158. *Gawer v. James.* Trin. 14 G. 2. C. B. Buller N. P. 151.

4. If plaintiff files his bill in Chancery, and pending the suit there, the statute of limitations runs against his demand, and his bill is afterwards dismissed as a matter properly cognizable at law; in such case the court will interfere and save his right, by not suffering the statute to be pleaded in bar of it. Though in this case it is said, that a bill depending in Chancery for six years is not sufficient to take a debt out of the statute of limitations. *Anon.* 1 Ver. 173. *Anon.* 2 Atk. 1. 1 Atk. 282.

But if a plaintiff has been delayed by defendant himself as by injunction staying proceedings till after the six years have run: in such case the plaintiff shall not be barred. *Anon.* 2 Chan. Caf. 217.

5. But though a writ has been sued out, yet if there have been no proceedings on it for six years, the statute shall run against the demand. *Lacon v. Lacon.* 2 Atk. 395.

Therefore wherever to *non assumpsit infra sex annos*; the plaintiff replies a writ sued out within the six years, he must also shew the continuance in the suit; and a *taliter processum*, &c. is not sufficient. *Budd v. Berkenhead.* 2 Salk. 420.

But this is only the case where the cause has been commenced by *latitat* or *common clausum fregit*. For where plaintiff replied to the plea * of the statute of limitations, an attachment of privilege sued out against defendant (being an attorney) *Finch v. Wilton.* 1 Will. 167. *P. 159.

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Whitehead
v. Buck-
land. Style.
373. 401.

attorney) on a certain day within the six years; it was held, that the continuances need not be shewn; for an attachment of privilege in *C. B.* is in the nature of an original, in which no continuances are required to be shewn, but merely the teste.

6th. "So if plaintiff replies to a plea of the statute, process which is *impossible* or a nullity, he shall be barred of his action; for such cannot take a demand out of the statute."

Green v.
Rivet.
2 Salk. 421.

As where to the plea of *non assumpsit infra sex annos*; plaintiff replied, a bill of *Middlesex* tested *die lune prox. post tres septimanas, &c.* and returnable the same day, and concluded with the other proceedings. On demurrer the defendant had judgment, for there cannot be such a bill of *Middlesex* as this is, returnable the very day of the teste, and the plea of the statute of limitations is to be favoured.

7th. "If a bill of *Middlesex* or *latitat* has been sued out in the vacation, it by fiction of law always bears teste as of the last day of the preceding term; it might therefore happen, that though a demand was really barred in point of time, yet by the reference to the last day of the preceding term; the process might seem to precede the time when the debt was in fact barred, and so take it out of the statute."

*P. 160.

Johnson &
al' Assignees
of Har-
grave v.
Smith.

*It was therefore decided in this case, that the defendant should not be found by this artificial reference to the last day of term, but might rejoin and give in evidence *the true time* when the process was sued out, so as to enable the statute to attach on the demand.

2 Burr. 950.

Lambert v.
Whiteby.

Pasch 1760.

B. R. Buller

N. P. 151.

†Osman v.

Bowley.

Hil. 12 G.

2. Per Eyre

Buller N. P.

149.

Buller. *ibid.*

Wherever therefore plaintiff endeavours to take advantage of this reference, defendant should rejoin; and in his rejoinder shew the true time when the writ was sued out.

†If defendant pleads *non assumpsit infra sex annos ante diem impetrationis brevis*, and the plaintiff reply *quod assumpsit, infra sex annos*, viz. such a day; the plaintiff is not obliged to prove the taking out the original, because there is a particular day mentioned in the replication: but if no particular day be mentioned, the plaintiff must prove the taking out of the original.

But there seems little foundation for that distinction; for though a particular day be named in the replication, yet the plaintiff is not bound to prove a promise on that day: and the manner of pleading to avoid the necessity of proving the original at the trial seems to be mistaken: for in such case plaintiff should reply, that he sued forth the writ on such a day, and that the defendant promised within six years of that day, and conclude with an averment: and then the defendant is at liberty to take issue in his rejoinder, either on the time of the writ being sued out or on the promise be-

*P. 161.

ing made within six years of the time mentioned, * they being

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being alledged as distinct facts in the replication; and when the defendant takes issue on one of these facts, he admits the other to be true, and so it need not be proved.

8th. "By *sec. 4.* of stat. 21 *Jac. 1. c. 6.* if the judgment has been arrested or reversed for error, or the defendant has been outlawed, and the six years expire: plaintiff may bring a new action, provided he does it within one year after such judgment has been arrested, &c. or the outlawry has been reversed."

9th. "Where the cause of action is to arise from an executory consideration, as some act to be performed and a promise to pay in consequence of it, there, *non assumpsit infra sex annos* is not the proper plea; for the *assumpsit* does not arise till the consideration is performed, which may be long after the promise made: it should be *actio non accrevit infra sex annos.*"

As in *assumpsit* plaintiff declared, that he, at the request of defendant, admitted *A. and B.* as guests to diet them, and that defendant promised to pay so much: defendant pleaded *non assumpsit infra sex annos*, and on demurrer it was held to be a bad plea: for it is not material when the promise was made, if the cause of action is within six years; from which time only the statute begins to run.

"This is the case of *assumpsit* generally, where the action is *indebitatus assumpsit* it is different."

* For where to such an action, founded on a promise to pay on demand, defendant pleaded *non assumpsit infra sex annos*, and plaintiff demurred for cause, that the plea should be, that there was no demand within six years, or *non assumpsit* within six years after demand: but the court held the plea good. "For an *indebitatus assumpsit* shews a debt due at the time of the promise made, and so the plea is good." But it had been otherwise had the duty arisen from a collateral matter.

*P. 162.

Collins v. Bunning. Cas. K. B. 444.

Powell v. Pierce. Mic. 4 G. 1. Buller N. P. 151.

10th. "In all cases where money is to be recovered back where paid by mistake, or for a consideration which happens to fail; the statute of limitations begins to run from the time of the money paid, for from that time the right to recover it accrues; but where there has been any fraud, there the statute will not run."

Defendant was administrator to his uncle *W. H.* and found among his papers a mortgage deed for 1200*l.* which he assigned for that sum to the plaintiff: it afterwards appeared, that this mortgage deed was a forgery, though unknown to defendant when he made the assignment; this transaction had taken place more than six years before the bringing of this action which was to recover back the 1200*l.* so paid, to which defendant had pleaded the statute of limitations; and it was adjudged to be a good bar, (though contended, that it should only commence from the time that the fraud was discovered,

Bree v. Holbech. Dougl. 630.

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*P. 163. discovered, which was within the six years :) particularly as no fraud appeared in defendant, * as that he knew of the forgery, which would have made a difference; or had he covenanted for the goodness of the title, which in this case he had not done.

Hopkins v. Dewar. 4th. Another plea in this action is *bankruptcy in the plaintiff*; for if pleaded, it is a sufficient bar to the action for defendant; or if proved at the trial, that the plaintiff was a bankrupt at the time of the work or labour done, it will be sufficient to nonsuit him.

“ But if the defendant pleads bankruptcy in the plaintiff, he must also plead the commission and *assignment* : ”

Cary v. Crisp. For where he pleaded only that plaintiff was a bankrupt, and so all his goods, &c. belonged to the commissioners, the plaintiff demurred and had judgment: *for till the assignment* the property of the goods is not taken out of the bankrupt.

2. “ So that *defendant* was a bankrupt and has obtained his certificate, is a good plea to discharge all debts due before his bankruptcy. ”

But there are certain exceptions to it.

1st. It is no discharge where the *commission* appears to be grossly fraudulent.

Sowley v. Jones. As where the bankrupt *had not been described by his true place of abode*, so that his creditors were not apprized of the person in the Gazette being their debtor.

* 2. “ Where the certificate has been *unduly obtained*, it is no discharge: as if there has been a *concealment of his debts*, which avoids the certificate by stat. 5 Geo. 2. c. 30. And by the same statute, if obtained by fraud, as by giving money to the creditors to induce them to sign it, either by the bankrupt himself or by any friend for him, by sect. 10. of the same statute, the certificate is declared to be void. ”

Robson v. Calze. And in this case, where a friend of the bankrupt's had given money to some of his creditors to induce them to sign the certificate; *which circumstance was unknown to the bankrupt himself at the time he made the affidavit*, directed by stat. 5 Geo. 2. c. 30. s. 10. by which he swore, “ that the certificate and consent of the creditors was obtained fairly and without fraud, ” but it came to his knowledge before the certificate was allowed by the Chancellor; it was adjudged, that the certificate was void: and the court seemed to be of opinion that it would be void though he had not known of it.

3d. “ But though by his certificate a bankrupt is discharged from all debts due at the time of the commission issued, yet he may make himself liable for a debt due before his bankruptcy, by a new promise, before his certificate obtained, provided it was not an inducement to sign the certificate. ”

Trueman v. Fenton. As in this case, where the bankrupt was indebted in two notes to plaintiff; he did not prove them under the commission.

Cowp. 544.

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sion; and on * cancelling them, the bankrupt gave him a *P. 165.
note for little more than half their amount; it was held to be
a good debt, and recoverable after the bankrupt had obtained
his certificate.

4th. A certificate under a joint commission shall discharge Wickes v.
a separate debt: for separate debts may be proved under a Strahan.
joint commission by a Chancellor's order on petition. 2Stra. 1157.

5th. "By statute 5 Geo. 2. c. 30. The effects of a bank-
rupt against whom a second commission has issued, are al-
ways liable to his debts, except on the second commission
he has paid fifteen shillings in the pound; therefore in such
case it should seem that this should be pleaded."

And though the *first commission had been superseded* by con- Thornton v.
sent of the creditors, they having received a composition, yet Dallas.
in the case of a second bankruptcy, the bankrupt must pay Dougl. 46.
fifteen shillings in the pound: for the statute has the words
in it, "*compounded their debts.*"

There are cases in which the bankruptcy has happened at
the time of the action brought, and the certificate been ob-
tained.

1. But where the cause of action was before the bank- Graham v.
ruptcy, and the action commenced during the bankruptcy, Benton.
but *the certificate not obtained till after the judgment*, so that 1 Wilk. 41.
it could not be pleaded, the bankrupt shall be discharged by
application to a Judge.

* 2. Where the party *becomes bankrupt after the action com-* *P. 166.
menced, he may plead the bankruptcy *puis darrein continuance*, Paris v.
which must be received if verified by affidavit; but in such Salkeld.
case it is not sufficient to say, "that on such a day he became 2 Wilk. 137.
"a bankrupt;" but he should add, "that he had conformed 139.
"to the statutes concerning bankrupts," or it is bad.

Note. When a bankrupt is sued, it is usual to apply by 1 Wilk. 41.
motion to the court to discharge him on common bail, which
on a proper affidavit, is done or refused according to the
circumstances; as in this case.

5th. The next plea I shall consider is that of a

Tender.

"Wherever the defendant admits that money is due to
"the plaintiff, it must be pleaded in the form of a tender."

For where to *assumpsit* for money had and received, &c. French v.
defendant pleaded *non assumpsit* to the whole of the plaintiff's Watson.
demand, except 10 guineas; and said, *that he was ready and 2 Wilk. 74.
always had been ready to pay the same*; this on demurrer was
adjudged to be a bad plea: for whether defendant was al-
ways ready to pay or not, is not issuable; it should have
been pleaded as a tender.

1. Where the agreement is to pay at a certain time, a Giles v.
tender at that time, and always * ready, is a good plea; but Salk. 622.
where *P. 167.

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where the money is due and payable immediately by the agreement, the party must plead *tout temps prist*, from the time of the promise: and therefore, in such case, *this plea is bad after an imparlance*, for by that it appears, that the defendant was not always ready.

Baily v. Holdstone. Trin. 16 & 17 G. 2. Buller N. P. 156. But a tender may be pleaded after an imparlance *by leave of the court, under particular circumstances*: as where the writ was returnable in *Easter* term and the declaration not delivered till the day before the *Essoign* day of *Trinity* term, and the defendant lived in *Shropshire*, so that the agent could not get instructions in time.

Sweatland v. Squire. 2 Salk. 623. 2d. Where the action is *indebitatus assumpsit* if defendant pleads a tender, it must be with a *tout temps prist generally*; for where it was that he was *tout temps prist after the tender*, it was held ill on demurrer: for it is not enough that he was always ready after the tender, for the money was due before, and the neglect of payment was a delay, a breach of contract, and a cause of action; and therefore the plaintiff should have judgment for the time which is unanswered.

Johnson v. Lancaster. 1 Stra. 576. 3d. It was adjudged on demurrer, that a tender was pleadable to a *quantum meruit*.

Ferrand v. Pearson. Pasch. 2 G. 1. C. B. Buller N. P. 156. * P. 168. 4th. Where there is no certain time in the promise for payment of the money, the defendant is to be always ready, and when he pleads *semper paratus*, the plaintiff must in his * replication shew a special request and refusal, if there be any, for the request laid in the declaration is not material nor traversable.

Lancashire v. Killingworth. 2 Salk. 623. 5. Where a time and place is fixed for payment, if the parties meet, he that pleads a tender must also plead a refusal, or such plea will be bad on demurrer, though good after a verdict; but if one be absent, the other must shew that he was at the time and place and made the tender; in which case he must shew at what time of the day he was there and how long he staid; for he ought to shew that he has done all that could be done to accomplish what by his agreement he was bound to do. 5 Co. 114. Yelv. 38. Cro. Jac. 13.

And in such case, the last part of the day is the time by law appointed for a tender, unless the circumstances of the case point out another time, as payment on the transfer of stock, which must be from ten to twelve.

Under the head of a tender falls the case of payment of money into court.

Pether v. Shelton. 1 Stra. 638. 1. For wherever defendant pleads a tender *he must always pay the money into court*, he admits to be due, for without that it is no plea, and plaintiff may sign judgment.

Hand v. Lady Dinely. 2 Stra. 1220. 2. If defendant pays money into court, but does not afterwards pay plaintiff *his costs* up to that time, plaintiff may go on with his action.

3d. If

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* 3d. If after money paid into court, plaintiff proceeds in his action, it is at his own peril: for if he does not prove more due than is so paid into court, he shall be nonsuited, and defendant have his costs; for a tender and refusal discharges costs. *P. 169.
3 Black.
Com. 304.
Anon.
1 Vent. 21.

As to what shall be a good tender.—It is settled,

1. That if defendant proves a tender in *bags* it is sufficient, for it is the receiver's business to tell it: but if the defendant says, "here, I am ready to pay you," and yet holds the bags all the time under his arm, it is no good tender. Wade's case. 5 Co.
114. 4 Res.

2. A tender in foreign money made current by proclamation, is a good tender. S. C. 2 Res.

And *Note.* The defendant cannot plead *non assumpsit* to all the counts and a tender beside. Dowgall v. Bowman.

6th. The next plea in this action I shall treat of is that of 3 Will. 145.

Infancy.

Though this may be also given in evidence of the general issue of *non assumpsit*, for the *promise of an infant is absolutely void.* Darby v. Boucher.
Salk. 279.

"The general rule in the case of infants is, that they are liable on no contracts, *except for necessities*, as meat, drink, education, clothes, &c."

* 1. But necessities for an *infant's wife* are necessities for himself, and he shall be liable; but if furnished *in order for the marriage*, he is not liable: for she was not *then* his wife, nor the goods furnished on his credit. *P. 170.
Turner v. Frisby.
1 Stra. 168.

2. So if one under age, contracts for the *nursing of his child*, it shall be deemed a lawful contract and he shall be liable. Bac. Max.
18 Max.

3. "So whatever is for the *benefit of an infant's estate*, he shall be liable to in this action."

As where a copyhold estate descended to an infant and a reasonable fine was assessed; it was adjudged, that *indebitatus assumpsit* lay against the infant for that fine when he attained his full age, he having enjoyed it during that time. And *Yates J.* was of opinion, that it would lie during his infancy, though *debt* would not. Evelyn v. Chichester.
3 Burr. 1717.

So if a *lease be made* to an infant, and he occupies and enjoys under such lease, he is chargeable for the rent incurred during the time he continues in possession. Kirtton v. Elliott.
2 Bullst. 69.

"But these cases suppose the infant not to be *sub potestate parentis.*"

For if an infant lives with his parents and is maintained by them, he is not liable for any thing furnished to him, even though they might otherwise be deemed necessities; for the parent is the proper judge of what are necessities, and this would encourage extravagance. Bainbridge v. Pickering. 2 Black.
Rep. 1325.

* 4. But though an infant is liable on his contract for necessities, yet if one *lends money* to an infant, even to pay for necessities, *P. 171.
Earle v. Peele.
Salk. 386.

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necessaries, the infant is not liable; for it may be misapplied, and therefore the law will not trust him with the expenditure; but it is at the peril of the lender, who must lay it out for him, for then in fact it is providing him with necessities: besides, the *assumpsit* is founded on the *lending*, not on the application.

Ellis v. Ellis.
Cas. K. B.
197. So that if the plaintiff proved that the money was lent to pay for necessities, and *applied to that purpose*, he might be entitled to a verdict: but in such case the defendant should rejoin and take issue on the expenditure.

“And therefore in such case, “*that the goods were necessities*, is the only proper replication.”

Clowes v.
Brook, 2
Stra. 1101. For where in *assumpsit* on a farrier's bill and infancy pleaded, plaintiff replied, that it was for necessities for the infant's horses; on demurrer the replication was held to be bad: for *non constat*, that the horses were necessities for the infant.

5th. “Goods furnished to an infant in the way of his trade, are not necessities, and therefore he is not liable;” for the law will not allow him to trade, which may ruin him.

Whittingham v. Hill.
Cro. Jac.
494. In *assumpsit* for goods sold and delivered, defendant pleaded infancy, replication that they were *pro necessario victu & apparatu ad manutentionem *familie sue*. Defendant rejoined, that he was a mercer at *Shrewsbury*, and bought these wares to sell again, and traversed that they were *pro necessario*, &c. demurrer thereupon: and *per curiam*, this buying for the maintenance of his trade, though he gains thereby his living, shall not bind him, for an infant shall not be bound by his bargain for any thing but necessities, as meat, drink, or learning.

Whywall v.
Champion.
2Stra. 1083. And this was so ruled by Ch. Jus. Lee in this case, which was an action for tobacco, sent to defendant who was an infant and kept a shop in the country; which the court held would not lie against an infant, whom the law would not suffer to trade.

Buller N. P.
154. Though in another case before Mr. Baron Clarke, where in defendant gave nonage in evidence; it appeared, that he had set up a farm and bought the sheep from the plaintiff to stock it: the Judge charged the jury to find for the plaintiff; and said he thought the law should not put it into the power of infants so to impose on the rest of the world.

“And so much are the contracts of infants deemed void for any thing but for necessities.”

Stone v.
Withy-
poole.
Cro. Eliz.
126. That if an infant contracts debts for articles not necessities, and dies, and his executor promises to pay, yet it shall not bind the estate: for the contract on which the promise was founded being void, the promise shall be deemed so too.

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* 6. " But though an infant is thus exempt from all de- *P. 173.
 " demands, except for necessities, yet if goods, *not* Southerton
 " necessities, have been delivered to an infant, and, *after* v. Whitlock.
 " his coming of age, he promises to pay for them, he thereby 27 G. 3.
 " ratifies the contract, and shall be bound to pay." And 1 Stra. 690.
 " what amounts to such confirmation shall be matter to be
 " left to the jury.

And where to a plea of infancy plaintiff replies, that the Borthwick
 defendant had ratified his promise after coming of age, and v. Carru-
 defendant rejoins that he had not so ratified his promise after thers. Pasch.
 full age, upon which issue is joined. It is sufficient for plain- 27 G. 3.
 tiff to prove the promise, and the proof that defendant was B.R. Term
 not then of full age lies upon defendant, though the assertion, Rep. 648.
 that he was of full age, makes part of plaintiff's replication,
 for whether of age or not is a matter which lies within de-
 fendant's own knowledge, and not within the plaintiff's.

7. " But where plaintiff relies on a new promise made after
 " full age, the infant must always be charged on the simple
 " contract."

For where an infant bought a chariot and horses, and gave a Capper v.
 single bond for the money, and after, at full age promised to Davenant.
 pay, this matter being specially found, the court was of opi- Trin. 29
 nion that the contract was so extinguished by the bond, that Car. 2. B. R.
 it did not remain to be a consideration for his promise at full Bull. N. P.
 age, and so they gave judgment for the defendant. 155.

* But if the things furnished were necessities, an infant may *P. 174.
 bind himself by bond, but it must be in a bond to the exact Ayloff v.
 amount and value of the necessities furnished; for where it Archdall
 was with a penalty, it was adjudged to be void, but that a Cro. Eliz.
 single bond had been good. 920.

And so where an infant gave a single bill for payment of Russell v.
 necessities, it was held good against the infant. Lec. 1 Lev.
 87.

" But though an undertaking or promise is made to an in-
 " fant, in consideration of such infant's promise, though this is
 " void; yet, if the promise is for the infant's benefit, he may
 " maintain an action on it." As in this case, which was that Holt v.
 of mutual promises to marry, and one of the parties was an Wood.
 infant, the infant recovered damages for breach of the pro- 2 Stra. 973.
 mise of marriage.

7. In *assumpsit* under the statute for use and occupation of Lewis v.
 an house, by permission of plaintiff, *nil habuit in tene-* Willis. 1
mentis is a bad plea. For the action is founded on the promi- Willf. 314.
 ses, and therefore if the plaintiff had an equitable title, or no
 title at all, yet if defendant enjoyed, by permission of the
 plaintiff, it is sufficient. For it is not necessary for the plain-
 tiff to say, that it was his house, any more than in *assumpsit* for
 goods, it is necessary to say that they were his goods. But the
 plea would be good at common law, for there an interest is
 supposed to pass from the lessor.

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*P. 175. * 8. "*A judgment for a defendant in one personal action, is a good bar to another personal action for the same cause,*" (6 Co. 7.) But the cause of action must be specially stated to be the same.

Kitchen v. Campbell. 2 Black. Rep. 779. 3 Will. 240. S. C. 2 Black. Rep. 827. 3 Will. 304. As where a creditor to a bankrupt had after the commission of bankruptcy sued out execution, and the sheriff had seized the goods, for which the assignees had brought *trover*, but had had a verdict against them. Having afterwards brought *assumpsit* for the money arising from the sale of the same goods, the plea of *the former recovery in trover* was held to be ill, *for want of the proper averments* to support the plea, that *the question or cause of action was the same*, though the court held clearly that the assignees having failed in the action of *trover*, could not recover in *assumpsit*, for the price of the same goods. So that, if the pleading had been proper, the bar had been a good one. And the test when one action shall be a bar to another is, *when the same evidence is required in both actions, as was the case in this.*

Willes v. Needham. 1 Ld. Raym. 180. 9. "That the money for which the action is brought *has been attached in defendant's hands, by foreign attachment*, is a good plea: so it may be given in evidence on the general issue." Vid. plen. Action of Debt. chap. 2.

Palmer v. Hooke. 1 Ld. Raym. 727. But if defendant pleads such foreign attachment at the suit of J. S. or gives it in evidence, he should prove, *that the plaintiff was indebted to J. S.* for otherwise it might be a collusion

*P. 176. *between J. S. and the defendant to defraud the plaintiff.* But the plaintiff is at liberty to shew that the suit in London for the attachment was commenced *after an original filed by the plaintiff against the defendant*, for that would avoid the operation of the foreign attachment, the suit being actually commenced in the courts above when the attachment took place.

Openheim v. Levy. 2 Stra. 1082. 10. "*Alienage in the plaintiff is a good plea in abatement, but it must be, that he is an alien enemy; for alien friends may maintain personal actions, and it shall not be presumed that he was an enemy.*"

Turner v. Beale. Salk. 521. 11. "*A discharge under the insolvent debtors act is a good plea.*" But in such case defendant should shew that he was a person within the benefit of the act, and that the discharge was in every respect regular and pursuant to the statute. 12th. "*A release is also a good plea in this action.*"

May v. King. Cas. K. B. 538. And a promise before it is broken may be released by parole, but after it has been broken it cannot be discharged without deed, by any new agreement without satisfaction. "But till there is no duty or demand, there is nothing whereon the release can operate."

Drage v. Netter. 1. Ld. Raym. 65. Therefore where to an action on a bill of exchange, against the drawer, he pleaded a release after the bill drawn, but before the acceptance; it was adjudged bad. For the release

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lease was before the defendant was chargeable, the acceptor being first liable.

* 13. Where an action is brought by an administrator, it is **P. 177.* a good plea "that the intestate was resident within a different diocese when he died;" for simple contract debts are personal, and the administration must be committed of them where the party dies. And if a man has two houses in different dioceses, and lives mostly at one, but goes occasionally to the other, where he happens to die; administration shall be granted by the bishop of the diocese where he died, for he was commorant there, and not merely as a traveller.

14. The last plea I shall consider is, that of the *general issue* which is *non assumpsit*. Though where defendant pleaded *not guilty* it was held to be good after a verdict, though if plaintiff had demurred, it had been bad.

Under this issue the defendant may go into equitable defence. He may prove a release without pleading it, and take advantage of every equitable allowance possible.

As in *assumpsit* for money had and received, defendant may, under the general issue pleaded, give in evidence *a retainer* so much in his hands as due to him by the plaintiff, without pleading or giving notice of it as a set-off; for the plaintiff can only recover what in equity and conscience is due, which is what remains due after all fair deductions.

2. So he can give *payment* in evidence on the general issue, or he may plead it. For as **there is no debt, there shall be presumed to be no promise.*

3. So under the general issue he can give an *usurious contract* in evidence. For the statute having declared all such contracts as absolutely void, there can be no *assumpsit*.

4. So *infancy* may be given in evidence on the general issue.

5. And in general whatever defeats the promise is good evidence on *non assumpsit*: as where a seaman had sued in the admiralty court for his wages, and had judgment against him there, and afterwards brought *assumpsit* at law; the first sentence was held to be conclusive evidence against him.

6. The subsequent proceedings now alone remain to be considered, viz. the Verdict, the Judgment, and Writ of Enquiry.

Of the VERDICT.

"The verdict should follow the issue. For if plaintiff declares that defendant assumed to do divers things, and the jury find that he assumed to do only a part, plaintiff hath failed in his case."

As where plaintiff declared, that in consideration of, &c. defendant undertook and assumed to give him 13l. a field of

Hilliard v. Cox. Salk. 37.

Marshall v. Gibbs, 2 Stra. 1021. Elrington v. Dosham. 1 Lev. 142. Per Lord Mansfield. 2 Bur. 1010.

Dale v. Sollet 4 Burr. 2133.

Hatton v. Morfe. Salk. 394. **P. 178.*

Lord Bernard v. Saul. 1 Stra. 198.

2 Stra. 733.

de Simms v. Westcott, Cro. Eliz. hemp, 147.

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hemp, and other matters; and the jury find that defendant only *promised to give him 13*l*. defendant had judgment.
 *P. 179. So if plaintiff declares on an absolute promise, and the jury
 Mustard v. find a conditional one, plaintiff shall not have judgment. For
 Hopper. the promise in the first case is entire, and if plaintiff fails in
 Cro. Eliz. proving part, he fails in the whole. And in the latter case
 149. the promise found is not that on which the plaintiff grounded
 his action.

“But where the ground of the action is not upon an entire
 “contract, but merely in damages, there the finding of the
 2 Burr. 906. “jury may vary. For it is a rule in this action that the plain-
 “tiff may recover less than he goes for, but not more.”

Gardiner v. Therefore in an action on a policy of insurance, where
 Crokdale, the plaintiff declared for a total loss, he was allowed to reco-
 2 Burr. 904. ver for a partial one only.
 1 Black Rep.

198. S. C. *So the jury may give less damages than are proved. As on
 *Boldero v. a promise to pay for an horse a farthing a nail, doubling each
 Andrews. time, which would amount to an immense sum.

2. Of the JUDGMENT and WRIT of INQUIRY.

When the jury find a verdict they then settle the quantum
 of the damages. But where there is judgment by default, or
 on demurrer, or any other interlocutory judgment, then the
 *P. 180. plaintiff's right to some damages is determined, *but the ex-
 press sum is settled by the intervention of a jury on a writ of
 inquiry, which goes to the sheriff, who returns them when
 found to the court, upon which plaintiff obtains final judgment.

As to which these points have been settled.

1. In an action on an agreement for goods at a sale, and
 judgment by default, defendant shall not on a writ of enquiry
 East India Company v. be allowed to go into evidence of fraud on the sale; for by suf-
 Glover. fering judgment to go by default, he admitted the agreement
 1 Stra. 612. as set out by the plaintiff, and the writ of inquiry is only to set-
 tle the quantum of the damages.

2. If the action has been on a promissory note, the note in ex-
 Snowden v. ecuting the writ of inquiry ought to be proved. Though cir-
 Thomas. cumstances may vary this rule, as here where defendant's at-
 2 Black Rep 748. torney offered to admit the whole, if execution was stayed.

3. Wilf. 1:5. S. C. & con- *But in proving the note, it is not necessary to be done by the
 tra. subscribing witness, but it may be done by proving the party's
 *Bevis v. hand. For the note being set out in the declaration, is admit-
 Lindfell. ted, and the only use of producing it is to see whether any mo-
 2 Stra. 1149. ney is indorsed on it as received.

3. If an indorsed bill of exchange is not paid when due, the
 Anriol v. indorsee in an action against the indorser is after a protest not
 Thomas. barely intitled *to legal interest, but shall also have all the
 Trin. 27 G. incident expences, as exchange, &c. if such charges are
 3. B. R. reasonable.
 2 Term. Rep. 52.

*P. 181.

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4. If on a judgment by default and writ of inquiry, the plaintiff proves an account stated, and balance then due to the plaintiff, the jury should *give interest* for the sum so settled, *from the time of its being so liquidated to the bringing of the action.* And *per Cur.* in this case, where a note is due, it bears interest from that time; where money is lent, it bears interest from the time it becomes payable; but for money due for goods sold, no interest is allowed.

5. There must be the same notice of executing a *scire fieri* inquiry as a common writ of enquiry. Blaney v. Hendrick. 3 Will. 205.

6. Judgment on a writ of enquiry was set aside; it appearing that the under-sheriff, who had returned the jury, was attorney for the plaintiff in the action. Stead v. Lateward. 1 Stra. 622. Baylis v. Lucas. Cowp. 112.

And note as to costs,---That where defendant pleads a tender, which is found against him, that under statute 43 *Eliz.* 6. if the damages are under forty shillings, the judge may certify and deprive the plaintiff of his costs. Bartlett v. Robins. 2 Will. 258.

C H A P T E R II.

*THE ACTION OF DEBT. *P. 182.

DEBT is an action founded upon an *express contract*, in which the certainty of the sum or duty appears, and in which the plaintiff is to recover the sum he goes for in *numero*, and not in damages.

In this action I shall consider, for what it lies considered.

1. *With reference to the contract.* 2. *With reference to the person.*

Debt considered with reference to the contract lies,

- 1st. On simple contracts.
- 2d. On special contracts under seal, as bond and leases.
- 3d. On matters of record, as judgments, statutes, and recognizances.

1. Of DEBT on SIMPLE CONTRACTS.

Debt lies upon all simple contracts, wherein there is a commutation of property for money. As for the price of goods sold, wherein the price has been ascertained between the parties: but for such causes this action is now seldom brought, first, because the wager of law is allowed: 2dly, because plaintiff must recover

Slade's case. 4 Co. 94.
3 Rep.
*P. 183.

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recover the *exact* sum declared for or he cannot have judgment; which being often uncertain, it has given way to the action of *assumpsit*.

But as this action may still be brought for simple contracts, it may be proper to take notice of some cases in which *debt* will not lie.

Pinchon's case.

9 Co. 87.

Morgan v. Green. Cro.

Car. 135.

*Sands v.

Trevilian.

Cro. Car.

140.

Per Holt.

2 Ld. Raym.

842.

Hard's Case.

Salk. 23.

And 1st. *Debt on simple contract* will not lie against an *executor or administrator*; the proper remedy is an action on the case. For the testator might have waged his law, which the executor or administrator cannot do.

*2d. If a man retains an *attorney* to conduct a suit for him, the attorney may have debt for his fees: but if one promises an attorney to pay him, if he acts for another person, debt will not lie; for there was no *quid pro quo* whereon to found a contract: the action should be on the promises; and besides, that the attorney has a remedy against the party for whom he acted.

3d. Debt will not lie against the *acceptor of a bill of Exchange*, for notwithstanding the acceptance, the drawer still is liable; so that it is not the actual debt of the acceptor, but he is rather in the nature of a security; but it lies against the *drawer* himself, for he was really a debtor by receipt of the money.

*P. 184. * 2. OF DEBT ON SPECIAL CONTRACTS.

These are 1st. On Bonds. 2dly. on Leases.

1st. Of Bonds.

I shall first consider what bonds are good in law: and secondly, what are void.

"Bonds good in law are such as are entered into by parties able to contract, voluntarily, and for a consideration, which is according to law."

1st. A bond must be *by parties able to contract*.

Litt. § 259.

1. Therefore bonds made by *infants* under 21 years are void.

And such is likewise the case of *femes covert*.

Co. Litt.

172.

But there is an exception, that infants may bind themselves to pay for meat, drink, apparel, or other necessities, and it will be good in law.

Ayliffe v.

Archdall.

Cro. Eliz.

928.

But it must be in an obligation for the *very sum* necessary for the purposes: for an obligation, *with a penalty*, conditioning to pay for necessities is void.

Beverley's

case. 4 Co.

123. 1 Res.

*P. 185.

Yates v. Bo-

ron 2 Stra.

1104.

2. So every deed which any man *non compos* makes is avoidable.

*But modern resolutions seem to consider it as absolutely void; for defendant to debt on a bond may plead *non est factum* and give lunacy in evidence.

In

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In all these cases of infants, feme coverts, or persons insane from the weakness, want or imbecillity of judgment, or want of power, their contracts are deemed void in law.

2d. Bonds must be entered into voluntarily.

1. It is essential to a bond that it is entered into *voluntarily*, for Whelpdale's case. 5 Co. 119. 2 Res. if obtained by *durefs* the bond is voidable by the obligor: but as the bond on the face of it appears to be good, obligor must avoid the bond by *pleading* to it *durefs*; for the court must decide by the verdict of a jury, if it was obtained by *durefs* or not.

"And these cases have been deemed *durefs* sufficient to "avoid a bond."

If given by defendant when *under an arrest* made *without any cause of action*; or if the arrest was for a just debt, but made *without good authority*; or if the arrest was made by a warrant from a justice of peace on a *charge of felony, when no felony in fact was committed*; or if a felony was committed, yet if the arrest was *unlawfully made* it is *durefs*: And bonds entered into by persons in custody under those circumstances, are avoidable in law. Wooden v. Collins. Mic. 9 G. 2. Buller N. P. 172. Morgan 223.

"And it is the same in a court of equity."

* For though a man is arrested by due course of law, yet if a wrong use be made of it, as compelling him to execute deeds not before thought of; a court of equity will consider it as *durefs* and relieve him. *P. 186. Nicholls v. Nicholls. Atk. 409.

But *durefs of goods* will not be sufficient to avoid a bond: though held otherwise in 1 Roll. Ab. 687. Sumner v. Ferryman. 2 Stra. 917.

"And *durefs* shall only avoid the bond *as to the obligor himself*."

And therefore it was held no discharge *to the surety*, who had joined in the bond, and against whom there had been no *durefs* practised. Huscomb v. Standing. Cro. Jac. 187.

2. If a man menace me, except I make him a bond for 40*l*. and I tell him I will not do it, but will give a bond for 20*l*. the court will not expound this bond to be a voluntary one: for *non videtur consensum retinuisse, qui ex præscripto minantis aliquid mutavit*. Bac. Reg. 22.

3. Bonds must be for a consideration which is according to law, which involves the consideration of, What bonds are void? For such are void whose consideration is not legal.

2. What bonds are void.

These are first such as are void in their creation; or 2dly, such as are void by matter subsequent. Co. Lit. 206. b.

* Bonds void in law at their creation are such whose consideration is, *malum prohibitum*, or founded on express prohibitory statutes; as simony, usury, &c. 2d. *Malum in se*. 3d. which are contrary to the good policy of the state, as in restraint of trade, *ex. gr.* and are founded on the common law. *P. 187.

D E B T.

1. "Bonds given for what is *malum prohibitum* are void." As first, Bonds given for an *usurious* consideration.

1. By statute 12 Ann. c. 16. *sect.* 2. "All bonds, or other securities given for money, whereon shall be reserved interest above 5*l.* per cent. are declared to be void."

Pollard v.
Scoly.
Cro. Eliz.
20.

But where the first bond or security is entered into *bona fide*, and the interest legally reserved: a subsequent agreement reserving more than legal interest *on the first contract* shall not avoid it; though the last agreement is void under the statute.

5 Co. 69. b.

2. "Several evasions have been attempted of this statute, but the courts have uniformly supported its spirit: for how-
"ever disguised the agreement might be, if in fact it was
"usurious; it has been held to be void."

Lowe v.
Waller.
Doug. 708.

As 1st. Where the lender of the money compelled the borrower, to take goods at a price considerably above their value in the form of a sale; and afterwards had them re-purchased at a lower price, whereby he reserved to himself

*P. 188.

*a greater profit than 5*l.* per cent.; it was adjudged to be usurious.

Patterson's
case.
Cro. Eliz.
104.

So where defendant sold to plaintiff goods of the value of 20*l.* and it was agreed, that plaintiff should pay for them within six months 34*l.* this was held to be usurious.

Floyer v.
Edwards.
Cowp. 112.

But however, where plaintiff sold goods, *viz.* gold, to the defendant, to be paid for in three months; but if not then paid, that defendant should pay one halfpenny per ounce for every month after, though this exceeded 5*l.* per cent. yet it being proved to be the *usage of the trade*; it was on that ground held to be not usurious, though if it had not been a *bona fide* sale, but merely colourable to cover a loan, it had been otherwise.

Bedo v.
Saunderson.
Cro. Jac.
440.

So where illegal interest was reserved, in the form of rent for an house; it was held to be usury.

2. "If by any possibility above legal interest *can be received*
"on the contract, it shall be deemed usury: for uncertainty
"of receiving does not prevent it from being so deemed as
"usurious contract."

Button v.
Downham.
Cro. Eliz.
642.

As where the bond reserved 10*l.* for the forbearance of 20*l.* for one year, *if the son of A. was then alive*, though the life of the son of A. was uncertain, and so the interest might wholly be

Clayton's
case.
5 Co. 70.

lost, yet as by his living, above legal interest was to be paid; it was held to be usury: And for a further reason, that if

*P. 189.

the uncertainty of life might be allowed as an **evasion*, the interest might be reserved on the contingency of *many lives*, which would amount to a certainty.

Sayer v.
Glean.
1 Lev. 5.
1 Sid. 27. S.C.

For the rule is general, that where the principal is safe, and the interest only hazarded; if that is more than legal the contract is usurious.

3. "For no contract shall be deemed usurious in which the lender runs the risque of losing his principal, however large the interest reserved may be." As in the case of lending on bottomry or at respondentia, in which case, though the interest reserved far exceeds what is legal, yet is the contract good.

Sharpley v. Hurrell.
Cro. Jac. 208. 1 Sid. 27.

So where Mr. Spencer borrowed 5000*l.* of the defendant, for which he gave his bond for 10,000*l.* payable on the contingency of his surviving the Dutchess of Marlborough, though there was a great disparity of age; he being but 30 years of age and the 70, so that the contingency of his dying first appeared so slender, yet it being proved that he was of a very bad constitution; it was, on a solemn hearing, adjudged a fair contingency, and though the sum reserved far exceeded legal interest, yet as defendant run the risque of losing both principal and interest, it was adjudged not to be usurious.

Ld. Chesterfield & al' Executors of John Spencer v. Sir Abra. Jansen. 1 Will. 286. 1 Atk. 304. S. C.

"But where the contingency upon which the defendant is to lose the money is so very slight, that it appears to be merely an evasion." As if it was on the contingency * of a young and healthy person dying within three months; this shall be deemed usurious.

Richards v. Brown.
Cowp. 770.
2 Ref.
*P.190.

"Upon this ground it is that the grant of an annuity at ever so great an under price, is not usury, because the principal is absolutely sunk and gone to the lender."

Per Jus. Burnet.
1 Atk. 330.

And though there be a certain value for such things, and the sum given much below it, it is not usury unless there is some secret contract to repay the principal.

Tanfield v. Finch.
Cro. Eliz. 27.

So that in cases of loans in this form, the question turns upon, whether there was a fair purchase of an annuity, or a real loan of money under the colour of an annuity? For if the substance of the agreement was for a loan, a slight colourable contingency shall not take the agreement out of the statute of usury, where above legal interest has been reserved.

Richards v. Brown.
Cowp. 770.

But where the grant was in the form of an annuity, and there was a clause in the deed that the borrower might repay the sum given for the annuity at a future period, which would seem to make the sum advanced a loan and the annuity interest; yet the court held it not to be usury; for the repayment was casual and depended on the borrower (the grantor) himself, so that it was not in the lender's power to have his money at all events so that as to him the principal was gone.

Murry v. Harding.
3 Will. 390.

2d. "The next class of bonds which are void in law are, "By stat. 9 Ann. c. 14. which * enacts, that all bonds, mortgages, or other securities, given for money won at play, or lent to play with, or lost by betting, on persons playing, are declared to be void."

*P.191.

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3d. The next class are bonds given for *sale of offices*, which is declared to be unlawful by stat. 5 and 6 Ed. 6. c. 16.

Law v. Law. As where plaintiff having procured for his brother (defendant's testator) a place in the excise, by his interest with the commissioners, and testator gave him a bond conditioning for the payment of 10*l.* a year during his life; he died, having omitted payment for some years before his death; and plaintiff having put the bond in suit, equity relieved the defendant against it, as occasioning extortion, corruption, and the sale of offices.

Culliford v. De Cardonell. Salk. 466. But it has been decided, that where an office is within the statute, and the salary certain, if the principal *makes a deputy*, reserving by bond a lesser sum out of the salary, it is good, or if the profits are uncertain, reserving a part (as half the profits) it is good; for the fees still belong to the principal in whose name they must be sued for. But where a person so appointed gives a bond to the principal to pay him a sum certain, without reference to the profits, this is void under the statute.

4. "The next description of bonds whose consideration is *malum prohibitum*, are those given for *simony*, which are void under stat. 31 Eliz. c. 6.

As to this it has been decided.

*P. 192. *Baker v. Rogers.* Cro. Eliz. 788. 1. If the church is void, a bond given for the purchase of the presentation is clearly simony, and therefore void.

‡ 2. So if given for the next presentation, the incumbent being *in extremis*, it is simony.

§ *Winchomb v. Bishop of Winchester.* Hob. 165. But the purchase of the *advowson in fee*, the incumbent being on his death bed, and in fact dying the next morning, is not simony: for an advowson is a temporal and valuable right, and so capable of sale, and not simony, particularly where it appeared that such was not known to the person presented.

2. And as to presentations during incumbency, it is enacted by stat. 12 An. c. 12. "That to purchase the next presentation for money or profit, by any person, either for himself or another, is simony.

But to this are certain exceptions, which though founded on decisions previous to the statute, still are law. 2 Black. Com. 280.

Smith v. Shelbourn. Cro. Eliz. 685. As first. If a father purchases the next presentation of a living as a provision for his son, it is not simony; and this though the son was present at the making of the agreement; for a father is bound to provide for his son.

2. Bonds given to pay money to charitable uses, or as in this case, that the person presented should pay 10*l.* yearly to the son of the late incumbent while at the university, on receiving the presentation, are not simoniacal, provided* the patron or his relations are not benefited; as it would be if the

*P. 193.

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10l. had been reserved to the *patron's* son; for it is essential to simony, that the person presenting does it from some corrupt motive of profit to himself.

3. General bonds of resignation have been held to be legal by many decisions, upon the presumption that they might be to enforce some duty from the incumbent, *which as not contrary to law, as to resign when the patron's son came of age*: but these bonds are now held to be illegal by a modern decision: but *quære* if bonds to resign, as to provide for a son, or in case of non-residence, *if expressed in the condition of the bond*, are not still legal.

2. "The next class of bonds void in law are those whose consideration is *malum in se*. *Justin. Instit. Lib. 3. tit. 10.*"

1. As if a man be bound in an obligation, the condition of which is, *that he shall kill J. S.* the bond is void.

2. So where defendant's intestate gave to plaintiff a bond, the condition of which was, *that plaintiff should live with him in a state of fornication*, and that he should leave her an annuity of 60l. a year; the bond was held to be illegal and void.

† But if a man *debauches a woman before chaste*, or having seduced a woman before virtuous, *gives her a bond as a recompence, or a provision for her future support, it is *præmium pudoris*, and good in law.

And the practice of courts of equity is to the same effect.

For if a common strumpet obtains a bond from an inexperienced person, equity will set it aside. But where a man debauches a woman, and gives her a bond, it is *præmium pudicitia*, and the injury a sufficient consideration. And where such a bond was given, and obligor by deed agreed that the sum should be laid out in an annuity for the woman, the bond not being proved, was held bad in law, but equity relieved the woman to its extent from the recital in the deed.

3. "The last class of bonds void in law, are those which are not founded on any express prohibitory statute, but are against the common law, founded on the rule of law, *That contracts, which it is contrary to the good policy of the state to support, are void.*"

As 1st. "General bonds given *not to follow a trade* are void. But this is to be understood with some restrictions.

Bonds conditioning that obligor shall not follow a trade, where nothing more appears, are void, and even if a consideration appears they are void, for it is for the public good

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H

that

Peel v. Ld. Carlisle.

2 Stra 228.

Babbington

v. Wood.

Hutt. 111.

Fytche v.

Bp. of Lond.

Johns v.

Lawrence.

Cro. Jac.

Co. Litt.

206.

b.

Walker v.

Perkins,

Adminst. of

Perkins.

3 Burr. 1568.

1 Black. Rep.

517. S. C.

† Turner v.

Vaughan.

3 Will. 339.

*P. 194.

Marchio-

ness of An-

andale v.

Harris.

2 P. Wms.

432.

***P.195.** that every one should follow the business he is * fit for, and the courts never support such impolitic restrictions: but particular restraints (as not to follow a trade in such a street) may be good in law, in that case only *where a consideration appears*. But without such consideration they are void.

Broad v. Jollyfe. As where in consideration that obligee took the obligor of the bond, and instructed her in obligee's business, *without any fee*, obligor covenanted in a penalty *not to follow that trade within half a mile of obligee's then dwelling, or where she should after be*. This bond was held to be good, for it is only a particular restraint, and a consideration appears, viz. instruction in obligee's business without a fee.

Thompson v. Harvey. So if the condition of the bond is that defendant shall buy but a certain quantity of the articles he deals in, or only of certain persons, or at such and such times, the condition shall be deemed as a restraint of trade, and void in law.

"And so though the bond is not absolutely prohibitory of obligor's following a trade, but *that if he does so with- in the place restrained, he shall pay a sum of money*, it is void. For its effect is in restraint of trade."

Colgate v. Batchelor. As where the condition of the bond was, that if defendant's son should follow the business of an haberdasher within the county of *Kent*, or city of *Rochester*, or *Canterbury*, * that he should pay to the plaintiff 20*l*. It was adjudged to be void.

***P.196.** 2d. The next class of bonds void in law are those concerning marriage.

1st. "Bonds, whose conditions are in restraint of marriage, are void on the same principle as those in restraint of trade."

Lowe v. Peers. As where defendant gave to the plaintiff a promise of marriage, under seal, in these words: hereby I promise "Mrs. Catharine Lowe that I will not marry with any person beside herself, if I do I agree to give her 100*l*." **4 Burr. 225.** Defendant, having married another, was sued on this covenant, and plaintiff had a verdict. But judgment was arrested; for it was not a covenant absolutely to marry, but to restrain the defendant from marrying any other person, though the plaintiff was not bound to marry him, and so being in restraint of marriage was adjudged to be void.

* 2. Bonds given to procure a marriage with any person are void. For in general all marriage brokerage bonds are void.

† 3. Bonds given to refund part of a marriage portion are void, as fraudulent on the contracting parties.

Woodhouse v. Shipley. 4. Bonds given to each other by a man and woman, under a penalty, to marry after the death of the father of one of the parties are void. For it is a partial restraint, and fraud on the * parent, and tends to encourage the disobedience of children.

***P.197.**

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5. So where plaintiff undertook by bond that in consideration of defendant's giving his consent that his ward should marry the plaintiff, *that he would release all sums due by defendant to his ward's estate.* This bond was deemed to be void. Duke of Hamilton v. *Ld. Mohun.* 1 P. Wms. 118.

Note: These cases are inserted here for the sake of uniformity, being the proper objects of relief in a court of equity. Though according to the doctrine in 2 *Wils.* 348, such illegal consideration might be pleaded to an action of debt on the bond.

3d. "The next class of bonds falling under this general head, are those given for the *withholding of evidence.*"

For all such bonds are illegal and void

As where defendant and others being indicted for perjury by one *Rudge*, the plaintiff gave his note to *Rudge* for a sum of money to induce him not to prosecute, and defendant to indemnify the plaintiff against the note, and repay him the money, gave the bond in question. *Rudge* did not prosecute, and plaintiff paid him the amount of the note, and then sued defendant on the bond, who having pleaded the consideration, it was resolved, that the note being given for an illegal purpose (the compounding the prosecution) and the bond given to * secure and repay that, that the bond was illegal and void. *Mason v. Wilkins.* 2 Vent. 109. *Collins v. Blantern.* 2 *Wils.* 344. *P.198.

4th. "Wherever by law particular powers or rights are annexed to any office, bonds limiting the exercise of those powers are void."

As where plaintiff, who was sheriff of *Hampshire*, on his appointing a person his under-sheriff, took a bond from him and defendant as his surety, one condition of which was, "that the under-sheriff should not execute any extent, liberate, elegit, or other process of execution, for any sum above 20*l.* without first acquainting plaintiff (the sheriff) with the same, and getting his special warrant for the execution." In debt on his bond defendant demurred, when it was resolved, that the office of under-sheriff is of long use, and, as deputy to the sheriff, he is invested with all the rights of office of the sheriff himself, such as executing process, executions, &c. that the sheriff therefore cannot make an under-sheriff without giving him those powers, nor abridge him of any part of them. That this condition, therefore, being to deprive the under-sheriff of one of the rights annexed by law to his office, was illegal and void. Sir Daniel Norton v. *Simes.* Hob. 12.

For it is essential to the appointment of a deputy that he be invested with all the power and authority of his principal, and any covenant or condition to restrain it, is void in law. *Parker v. Kett* Salk. 95.

But under this head of bonds void for the illegality of the consideration, two cases deserve notice. * The first is, *P.199.
H 2 "that

“ that though money has been lent *to be applied* to uses contrary to law by the obligee of the bond, and that known to the obligor himself (the lender of the money) the bond is good. Though if the bond had been given to discharge a debt arising from an illegal transaction between the obligor and obligee it had been otherwise.

Faikney v. Reynous. 4 Burr. 2069. As where the plaintiff and one *Richardson* were jointly concerned in certain stock-jobbing contracts, which were contrary to statute 7 Geo. 2. c. 8. and plaintiff having paid 3000*l.* on that account, the bond in question was given by defendant for the repayment of a moiety of that sum by *Richardson*. On debt brought on the bond this special matter was shewn, and on demurrer the court was of opinion that as between plaintiff and defendant it being a fair loan of money, and nothing illegal, that the bond was good; but had it been given for the money due on the contract for stock, contrary to the statute, it had been void.

Secondly, “ If a bond is for performance of articles of agreement, and part of them are contrary to law, though part of them are legal, yet is the bond void *in toto*.

Lee & Ux. v. Colehill. Cro. Eliz. 529. *P.200. As where in debt on a bond for performance of covenants in an indenture, they appeared to be that defendant covenanted that he being customer of *London*, had made one *Smith* (who was plaintiff's testator) his deputy, and that he * would surrender his letters patent, and procure others appointing *Smith* and him to the office, and that if *Smith* died living the defendant, that he would pay to his executor 300*l.* for which this action was brought. Defendant pleaded the statute 5 Ed. 6. c. 16. against the sale of offices. Plaintiff insisted that part of the covenant being good, that the obligation should be good as to these; but it was adjudged that the whole obligation was void, for so by putting in one good covenant, the whole statute would be evaded.

2d. *Bonds void by Matter subsequent* are these.

Co. Litt. 206. a. b. If the condition of a bond is possible at the time of making (as if the condition be that *J. S.* shall marry *A. B.* within a month,) but before the time come it becomes impossible, *first by aā of God* (as if *A. B.* dies within the time;) or secondly, *by the aā of the obligee himself*, (as if he marry her himself;) or thirdly, *by the aā of law* (as by *A. B.* marrying another, so that to marry *J. S.* is contrary to law,) in all these cases the obligation is saved, and the bond void.

Ibid. But if the condition of a bond is impossible at the time of making, as that obligor shall go to *Rome* in a day, the bond is not void, but is single, or for the payment of money without any condition.

Laughter's Case. 5 Co. 21. b. *P.201. 2. If the condition of a bond consists of two parts in the disjunctive, and both are possible at * the time of the bond (as where it was that defendant should either purchase to the

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use of J. S. his heirs, &c. lands of a certain value, or leave to the said J. S. by legacy, or otherwise, money to such an amount, that then, &c.) and one becomes impossible by the act of God, the obligor is not bound to perform the other part, for the condition is for the benefit of the obligor, and he has his option to perform either part to save his condition, and when deprived of one by the act of God, he shall not be called on to perform the other.

2. I shall now consider Debt for RENT.

And 1st. "At common law no action of debt lay for the arrears of a freehold rent, during the continuance of the lease." Therefore if there was lessee for life, and lessor died the rent being in arrear, such rent was not recoverable during the continuance of the life estate: for the arrears belonged to the executor, but could not be recovered, as no action of debt lay for them, and the heir had no title to the rent which became due in the life-time of the ancestor.

Andrew Ognel's Case, 4 Co. 49. Co. Litt. 162. a.

"But after the determination of the estate for life, the arrears then due were recoverable at common law by action of debt, for the sum due was not as a freehold rent, but as a personal charge."

S. C. & Abr. 595. Co. Litt. 162. a.

2. But a change was effected by statute 32 H. 8. 37. which enacts, "That the executors or administrators of tenant for life (that is **pur autre vie*, living *cestui que vie*. *P. 202. Co. Litt. 169) in tail or in fee, may have an action of debt to recover all arrearages of rent due in the life-time of the lessor, and during the continuance of the estate for life, from the tenant for life, who continues in possession, and ought to have paid the rent to the lessor when living." And by the sect. 3d. of the same statute, "the husband may have debt for arrearages due in the life-time of his wife in her right."

This statute only provided for the recovery of the rent in arrear at the death of the lessor, but gave no action of debt to him during his life, so that during that time his only remedy was an assize. But that was provided for by statute 8 Ann c. 14. s. 4. which enacts, "That any person entitled to rent arrear on a lease for life, or lives, may have an action of debt during the existence of the life, as on a lease for years during the term."

3. Such was the case of rents reserved on freehold leases; Litt. sect. but rents reserved on leases for years were at all times recoverable by action of debt.

4. So where there is *tenant at will*, with a rent reserved, Litt. sect. the lessor might always have an action of debt for arrears of rent.

5. As to *tenants at sufferance* it seems that an action of debt lay not against them for rent arrear, for the contract was

was

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*P.203. determined, and *they were in by wrong, but in such cases there is now a special provision made by stat. 4 Geo. 2. c. 28, which enacts, "That if tenants for life, lives, or years, or persons coming in under them, *hold over*, after determination of their estates after demand, and *notice given them by the landlord, or his agent properly qualified, to quit*, (which must be in writing by stat. 11 Geo. 2. c. 19.) in such case they shall forfeit *double the value* of the premises, to be recovered in an action of debt."

And by stat. 11 Geo. 2, "If the *tenant gives notice* to the landlord that he will quit, and after doth not, he shall forfeit *double the rent*."

Upon these statutes several decisions have taken place.

Williamson v. Colley. 5 Burr. 2694. 1. A receiver appointed under an order of the Court of Chancery, is "an agent properly qualified" within the words of the statute, and if he gives notice to the tenant to quit, and the tenant holds over, he shall forfeit the double value.

S. C. 2. Where the statute says, "After demand and notice in writing," the notice in writing is of itself a sufficient demand.

Cutting v. Derby. 2 Black. Rep. 1075. § S.C. 1077. 3. The notice to quit under stat. 4 Geo. 2. may be before the expiration of the lease or time of demise.

§ 4th. One tenant in common may maintain this action for the double value of his moiety.

*P.204. Timmins v. Rowleson. 3 Burr. 1603. § S. C. 5. The notice *by the tenant* to quit under stat. 11 Geo. 2. need not be in writing. A parol notice to quit is sufficient.

† 6. A parol demise from year to year is a sufficient holding within the statute, so as to subject the tenant to the penalty of double rent, if he holds over after he has given notice to quit.

6th. By stat. 11 Geo. 2. c. 19. § 12, "If an ejectment is served on any lands, &c. if the tenant does not give notice to the person of whom he holds, of the service of such ejectment, he shall forfeit three years rent of the premises, to be recovered by action of debt."

5. Of DEBT ON MATTERS OF RECORD.

1. The first species of debts, founded on matters of record, are those brought on sheriffs bonds. These arise in this manner. By stat. 12 Geo. 1. c. 29. "The plaintiff must make affidavit of the amount of his debt, which shall be indorsed on the back of the writ, and if it be for 10l. or upwards, the sheriff shall take special bail of the defendant, but not otherwise, for that and no more."

Naden v. Horsley. 2 Wils. 69. But if the sheriff does take bail for more than the sum sworn to and marked on the writ, it is not for that reason void: though he may be punishable. This statute therefore settles the only cases in which a bail bond is to be taken, viz. when the debt amounts to 10l. or upwards; and the man-

*P.205.

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ner of taking the bond is settled by stat. 23 H. 6. c. 10. §. 5. which enacts, " that the sheriff shall let out all persons bail-
" able upon reasonable sureties, except such persons as are
" taken by execution, *capias utlegatum, excommunicato capi-*
" *endo*, surety of the peace, vagrants refusing to serve accord-
" ing to the statute of labourers, or such as are committed
" by order of the justices."

Sect. 7. " And it shall be by obligation, with two sure-
" ties, made to the sheriff by his name of office, with con-
" dition that the defendant shall appear at the return of the
" writ, at the place required in the writ: and if the obliga-
" tion is taken in a different form, it is void."

Under this statute it has been decided.

1. " The undertaking for the appearance of defendant Rogers v.
" must be *by bond*:" for where it was a simple contract un- Reeves.
dertaking, for defendant's appearance at the return of the Mic. 27
writ; *assumpsit* being brought on it, the court held, that the G. 3.
statute having pointed out the mode, *viz.* by bond, was to B. R.
be pursued; and that a simple contract undertaking was void.

2. " So it must be " *with sureties*," for such are the Scryven v.
" words of the statute." Therefore where the bond was Dyther.
only by *defendant himself*, conditioning, that he the said R. Cro. Eliz.
Dyther would personally appear before the King's Majesty at 672.
Westminster, die Pasch. 15 dies, to answer, &c. it was held
to be bad. But a case was quoted of a Sir *W. Drury, where- *P.206.
in it was held that an obligation with *one surety*, was good.

3. " So the bond must be made to the sheriff " *by his* Symes v.
" *name of office*;" but the court held, that though such Oakes.
ought to be the form, yet that in this case the bonds being 2Stra. 893.
laid *solvend. eidem vicecom. & assign.* was sufficient.

4. " The condition must be to appear *at the return* of the Bennett v.
" writ;" for where the sheriff took a bail bond for the ap- Filkins.
pearance of the defendant *at a day different from that in the* 1 Saund.
writ, it was held to be void. 20.

" But if the substance of the return appears in the bond,
" the very words of the writ need not be set out."

For where the writ was returnable *coram domino rege ubi-* Shuttle-
cunq. fuerimus in Anglia; and the bail-bond wanted those worth v.
latter words, it was nevertheless held good. Pilking-

5. " The statute extends only to cases *on mesne process*, ton.
" and all other obligations made to the sheriff are void." 2 Stra.
1156.

For where the bond was given to the under-sheriff for a Empson v.
sum for fees of executing an extent: it was adjudged to be Bathurst.
void under stat. 23 H. 6. for one view of the statute was to Hutt. 52.
prevent extortion by confining the obligation only to the con-
dition of appearing. Cro. Eliz. 808.

6. " So the bail-bond must be founded on good and legal Mills v.
process;" for where it was *taken on a writ which appeared Bond.
to be returnable on a day out of term: the writ being void, 1Stra. 399.
the bail-bond was held to be so too. *P.207.

Though

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Though under the statute, if the defendant did not appear, the bond was forfeited, yet plaintiff was delayed in his suit; for remedy of which, and to expedite the proceedings, it was enacted by stat. 4. and 5 *Ann. c. 16. s. 20.* "That bonds taken for the appearance of the defendant under stat. 23 *H. 6.* should be assignable to the plaintiff in the action by indorsement in the presence of two credible witnesses; which may be done without stamp, under the hand and seal of the sheriff; and if the bail-bond is forfeited, the assignee may bring the action in his own name, having it first stamped."

Studley v. Sturt. 1. As the appearance day is the *quarto die post* the return day, the assignment should not be made till the four days are expired.
2 *Stra.* 782.

Bullock v. Lincoln. But of the four days the return day itself is exclusive, and the day following is counted the first; and therefore where the return day was on a *Wednesday*, the bail-bond was held not to be assignable till after *Monday*, for *Sunday* is not to be reckoned as one of them, and where it is the fourth day, the party shall have all *Monday* to put in bail.
2 *Stra.* 914.

Gregson v. Heather. 2. The sheriff may assign the bail-bond in any county, and plaintiff has his election to bring his action either in the county where the assignment was made, or in the county to the sheriff of which the writ was directed; as here, * where the writ was into *London*, and the assignment in *Middlesex*, where the action was brought.
2 *Stra.* 727.
* *P. 208.*

Kitson v. Fagg. 3. The sheriff, or under-sheriff, may make the assignment of the bail-bond, and these only can make it; for where in this case the assignment was proved to have been made by the under-sheriff's clerk; it was adjudged to be bad.
1 *Stra.* 60.

Walton v. Bent. 4. And the action on the bail-bond must only be brought in that court where the bail was given, or otherwise the proceedings will be stay'd, for the writ gives jurisdiction to that court only.
3 *Burr.* 1923.

Morris v. Rees. 2. "Such are the cases of bonds given on mesne process, I shall now consider the recognizance entered into by the bail above; whereby they undertake, that if defendant be condemned in the action, that he shall pay the costs and condemnation, or render himself up a prisoner, or that they will pay it for him."
3 *Will.* 348.
S. P.

Upon this recognizance the plaintiff in the original action may have debt against the bail, in case of the default of the principal; but as the declaration is very prolix, it is more usual to sue the bail by *scire facias*; and debt is only advisable where the principal has run away and the bail are likely to become insolvent; and for this reason, that in debt on the recognizance the bail are held to special bail, but not so on a *scire facias*.

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* But as debt may be brought against the bail it will be *P.209.
proper to consider the cases on that head.

1. Before the plaintiff can proceed against the bail, either Hobs v. Tedcastle. Cro. Eliz. 597.
by debt or *scire facias*, there must issue a *ca. sa.* against the principal (the defendant in the action); for one of the conditions of the recognizance was, that the defendant's body should be had in execution; and therefore the recognizance is not forfeited till that is not forth-coming, which is only judicially known by the return of *non est inventus* on the *ca. sa.*

Therefore where the bail brought error, and assigned it, Price v. Price. Cro. Eliz. 733.
that judgment was given against them without any *ca. sa.* having been awarded against the principal: judgment was for that fault arrested.

2. But a difference is to be observed where the proceedings are in debt on the recognizance, and by *scire facias*.

1st. "If plaintiff brings debt on the recognizance, the bail can surrender their principal before the return of the process against them, but not after."

For where plaintiff having brought his action on the recognizance in *C. B.* but finding that the defendant (the bail) was an attorney of *B. R.* was forced to desist; and filed his bill in *B. R.* the first day of *Michaelmas* term; on the 20th of *October*, before the defendant had *surrendered his principal: on *P.210.
motion, the proceedings were stayed; for those in *C. B.* were of no avail, and the tender of the body being before return of the process was time enough: for plaintiff should have commenced his action in the proper court at first.

And where the plaintiff brings debt against the bail, they shall have eight days after the return of the writ to surrender the principal; and if there are but four days in the term after the return, they shall have four days in the term following. Milner v. Pettit. 1 Ld. Raym. 720.

2. But where plaintiff proceeds by *scire facias* upon *non est inventus* returned, the bail have till the return of the second *scire facias* to surrender the principal and discharge themselves. Walmsley v. Havand. Cro. Eliz. 618.

And the first *scire facias* may be tested of the same day the *ca. sa.* is returnable. Steward v. Smith. 2 Stra. 866.

And there should be fifteen days between the teste and the return of it. Alyson v. Bylston. Cro. Eliz. 738.

3. "But this allowance of time till the return of the second *scire facias* is not matter of right but of favour."

For where the principal died before the return of the second *scire facias*, the bail were held to be liable. And in a yet stronger case, Glyn v. Yates. 1 Stra. 511.

Where the principal died after the return of *non est inventus* and before any *scire facias* issued, yet were * the bail held to be charged: for in strictness of law the bail are chargeable *P.211.
Barry v. Barry. 2 Stra. 717.
2 Wils. 67.

chargeable after the return of *non est inventus*, and the *scire facias* is merely *ex gratia*.

4th. "And in the following cases the bail shall be discharged."

1. "Where there has been an actual surrender."

Bailey v.
Smeath-
man.
4 Burr. 2134.

But where the action has been *by original*, the bail need not surrender on the return day but have till the appearance day, that is, the *quarto die post*. to do it.

"And the surrender must be during the sitting of the court."

Simonds v.
Middleton.
1 Will. 269.

For where on the second *sci. fa.* issued against the bail, they surrendered the principal on the *quarto die post*. to a Judge at his chambers; the surrender was held to be too late, and the bail fixed with the debt and costs.

2. "If an actual surrender cannot be made."

Trinder v.
Shirley.
Doug. 45.

As where the principal became a peer, so that by law his body could not be surrendered, it was held that an *exoneretur* should be entered on the bail-piece.

Bond v.
Isaac.
1 Burr. 339.

So where a man had been press'd and was then in custody, and so that by stat. 29 G. 2. c. 4. s. 14. he could not be taken out of his Majesty's service, except for a criminal mat-

*P. 212.

ter; his bail in a civil action were allowed to bring * him into court by *habeas corpus*, and surrender him by committing him to the custody of the marshal, and *instantly* remanding him to the Savoy, after entering an *exoneretur* on the bail-piece.

Loff v. Kel-
bridge. Cro.
Jac. 92.

5th. "Though the defendant has judgment in the court below, yet the bail are not thereby actually discharged."

For if error be brought on that judgment, and it be reversed, the bail still are liable, though the condition of the recognizance was to surrender, &c. *if condemned in the action in the said court*.

Meyer v.
Arthur.
1 Stra. 419.

6th. But if the plaintiff has judgment, and defendant brings a writ of error and a *sci. fa.* is sued out, *proceedings will be stayed against the bail*; but it is on the terms of the bail's consenting that if the judgment be affirmed, they shall surrender the principal, or give judgment on the *scire facias*.

2. "But it must be on application by the bail, before judgment against them had on the *scire facias*."

Fisher v.
Emerton.
1 Stra. 526.

For where plaintiff got judgment on the *scire facias* against the bail, pending error by the principal, and took them in execution, and they moved to be discharged, *per Cur.* If the bail had applied before judgment, the court would have stay'd proceedings: or if an action of debt had been brought on the judgment, they would have granted an imparlance; but * the bail by suffering judgment to go, have submitted to meet the plaintiff, and the judgment must stand.

*P. 213.

Ferrett v.
Gerv.
1 Stra. 443.

3. So the bail must apply to stay proceeding before the return of the second *scire facias*: for after the return of the second

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second *scire facias* the bail cannot surrender the principal, and therefore are fixed with the debt and costs.

“ And the reason of these decisions is this.” That pending a writ of error, the court cannot award execution, so that no *capias* can go against the principal; and therefore as the bail cannot take and surrender him, they shall not be charged. Wicksted v. Bradshaw. Hob. 116.

4. But the court will not stay proceedings against the bail merely on *bringing* a writ of error, unless bail to the writ of error has been actually put in; for till then it is no absolute *superfedeas*. Hunter v. Sampson. 2 Stra. 781.

2. The next description of debts founded on matters of record, are those brought upon

Judgments.

1. “ If a man recovers in the *superior courts* a debt or damages for any injury, in any action real or personal, he may afterwards have an action of debt on that judgment.” Speak v. Richards. Hob. 206. S. C. Noy 22. Cro. Car.

This was the common law remedy in cases where execution had not been sued out before * the expiration of the year and day after the judgment. But the statute of *Westminster* 2d, 45, having given the *scire facias* on the judgment, that is the practice now. 539. *P.214.

But however debt is still often brought on judgments, and that for the *remainder of the sum recovered*, where part has been levied on the goods of the defendant: so it will lie pending a writ of error. *Gribble v. Abbot. Cowp. 72.* Glascock v. Morgan. 1 Lev. 92.

“ But the judgment must be an actual subsisting judgment at the time of the action brought; for if by any means it has been discharged, this action will not lie.” 7 Mod. 62. 14. Sid. 236.

For where defendant's person had been taken in execution by a *ca. sa.* on the first judgment, and had been afterwards discharged out of custody, by consent of the plaintiff, upon his entering into an agreement, to pay certain sums at certain stipulated times, part whereof he had paid when plaintiff brought debt on the judgment for the *whole*: but the action was held not to lie, for the judgment was discharged by plaintiff's own consent; and so he could not have an action on it. Vigors v. Aldrich. 4 Burr. 2483.

2. Debt will lie upon a judgment of a foreign court (as in this case the supreme court of *Jamaica*) but it is not to be declared on as a matter of record, for 'tis here but of the nature of a simple contract debt; therefore in such case the judgment is sufficient only to establish a demand and put the defendant to impeach the * justice of it, or shew the same to have been unduly or irregularly obtained. Walker v. Witter. Dougl. 1. *P.215.

And

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- Crawford v. Whittal. Hil. 13 G. 3. Sinclair v. Frazer. Dougl. 4. Anon. 2 Vern. 540. * Shaw v. Thompson. Cro. Eliz. 426. † E. of Lincoln v. Fisher. Cro. Eliz. 581. † Wicker v. Norris. Buller N. P. 167. § Murray v. Willson. 1 Will. 326. 1 Roll. Abr. 599.
- And as it is but a simple contract, *assumpsit* will lie on it, as was decided in the two cases here mentioned; one of which was from *Jamaica* and the other from *Bengal*. And in another case from *Vernon*, where the judgment was from *France*, and held that *assumpsit* would lie.
- * So debt was adjudged to lie for a sum recovered in a court baron.
- † 3. "*Amercements* form the next class of debts for which " this action is maintainable." As where the steward of a court leet amerced a person for contemptuous words: it was adjudged lawful, and that debt lay for it.
- † So debt lies for an amercement in a court baron.
- § 4. Debt lies to recover the *costs of a nonsuit*, in an inferior court, by the defendant, below, and a general declaration is good; without setting out that the cause of action arose within the jurisdiction of the inferior court, or the proceedings at length.
5. The last class of debts on record are those founded on *statutes and recognizances*.
- Debt lies on a statute merchant, and also on a statute staple, for both are under the seal of the parties, and have all the solemnities of an obligation.
- * P. 216. * So where an obligation was entered into as a statute staple, but was void *as a statute*, for want of two seals in pursuance of the statute of *Acton Burnell*, yet plaintiff was allowed to bring debt on it, as an obligation; and he recovered.
2. So upon a *recognizance* taken in pursuance of stat. 23 H. 8. c. 6. before the Chief Justices of the *King's Bench* and *Common Pleas*, or the mayor of the staple at *Westminster*, out of term, and the Recorder of *London* jointly, for payment of money, and on which the process is the same as upon statutes staple, debt will lie, by stat. 8 Geo. 1. c. 25.
- So if the recognizance is taken in *Chancery*, debt lies on it.
- † And in like manner if the tenor of the recognizance so taken is certified into the *King's Bench*: for the tenor under the great seal is of the same notoriety and validity as if the original under the seal of the consor had been produced.
6. I shall now consider
- Afcue v. Hollingworth. Cro. Eliz. 494. Trott v. Spurling. Moor 811. Chamberlain v. Thorp. Cro. Eliz. 186. Cowper v. Langworth. Cro. Eliz. 608. † Roll. Abr. 600. Danv. 498.

DEBT WITH REFERENCE TO THE PERSON.

1. *As to Persons in General.*

- * P. 217. " No one shall be charged in debt on any bond or obligation, to any matter, or to any * person not mentioned in it; " for its extent shall be strictly limited to the condition."

As

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As where a bond was given, conditioning for the service and faithful account of all monies of the obligee, his executors or administrators, which should come to the hands of the obligor, while he served obligee as his clerk. The obligee died, *and the executors having continued the business*, it was adjudged, that the bond did not extend so as to make obligee's sureties liable to *them*, on his default, for the bond was personal to obligee himself. Barker v. Parker. Trin. 26G. 3. Term. Rep. 287.

So where defendant had joined in a bond *to the plaintiff*, Wright v. as surety for the faithful service of one *Baird* as broad-clerk *to the plaintiff*. Plaintiff afterwards took one *Delafield* into partnership, and in debt on the bond of security, the breach was assigned in *Baird's* having embezzled money *of the partnership*: to this was a demurrer, and the action was adjudged not to lie, for the bond was for performance of faithful service *to Wright only*, not to him and his partner. Russell. 3 Will. 530.

"These cases go on the ground of *the obligation being personal*, but where the bond was not so; as where it was made *to the house*, viz. for faithful service in *the counting house and shop*;" and the then partners in the house, to whom the obligation had been made, took in another partner; the bond was held still to remain in force and the obligees recovered on it. Barclay. Lucas. quot. 1 Term. Rep. 292.

* 2dly. *As to Heir, Executor and Administrator.* *P. 218.

1. "Obligee of a bond may bring his action, *either against the heir or executor*." And therefore where it was brought against the heir, and he pleaded *that J. S. had administered*; the plea was held to be ill, as both were liable. Davis v. Churchman 3 Lev. 189. Davis v. Pepys. Plowd. 439. S. P.

2. "In no case shall an executor be charged in debt, where the action would not lie against his testator."

For where *A.* covenanted with *B.* to put his son apprentice to *C.* or that *A.'s* executors should pay to *B.* 20*l.* the son was not put apprentice and *A.* died: It was adjudged, that debt lay not for the 20*l.* by *B.* against *A.'s* executor; for that testator himself had never been liable. But Perrott v. Aullen. Cro. Eliz. 232.

N. B. The authority of this case was doubted by Lord Mansfield. 3 Burr. 1383.

3. If an administrator does not perform the requisitions of his administration bond, the ordinary may authorize *a creditor or the next of kin to sue him on the bond*: for the next of kin are interested in the surplus and a creditor in the present disposal of the intestate's effects. Archb. of Canterbury. v. Houle. Cowp. 140.

Before the statute 22 Car. 2. An executor or administrator was compellable to account, but the ordinary was obliged to take the account as he furnished it without examining: so was a creditor, if he sued in the ecclesiastical court, * for he Archb. of Canterbury. v. Wills. Salk. 315. *P. 219.

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had a proper remedy at common law. But if a legatee had sued for an account in the ecclesiastical court, the defendant, before the statute, was obliged to prove the whole account, for the legatee had no other remedy, and the court could no otherwise exercise its jurisdiction of legacies to effect: since the statute, a person intitled to distribution is as a statute legatee, and shall therefore have the same remedy as a legatee before the statute; and now being by the condition of his administration bond bound to account at a day certain, he shall do it without citation: but this account is not examinable unless a party interested comes in and controverts it. And the condition of the bond being that he shall administer well and truly, that shall be construed *in bringing in his account*, and not in paying the debts of his intestate: And therefore a creditor shall not take an assignment of the bond and sue it, and assign for a breach the non-payment of a debt to him or a devastavit committed by the administrator; for that would be needless and infinite.

1 Roll. Abr.
931.

4. Executors are no further chargeable than they have assets, unless they make themselves so by their own act, as pleading a false plea; *i. e.* such a plea as would be a perpetual bar to plaintiff, and which they know to be false; as *ne unques executor* or a release to themselves; but if they plead a former judgment by another person *et nil ultra*, and plaintiff replies *per fraudem*, and it be so found, yet judgment shall be *de bonis testatoris*.

*P.220.

* 3d. *As to Baron and Feme.*

Vane v.
Minshull.
1 Lev. 25.

If a lease be made to a woman *dum sola*, and she marries, the term expires and she dies: debt lies against the husband for rent accruing during her life-time; for he is chargeable by reason of the perception of the profits.

4th. *As to Assignees.*

Walker's
case.
3 Co. 22.

1. If there is lessee for years, and he assigns all his interest to another, yet may lessor still have an action of debt against him for *rent in arrear after assignment*: first because the lessee shall not prevent by his own act such remedy as the lessor hath against him on his own contract. 2dly. That lessee might grant the term to a poor man who would not be able to manure the land, and so for need or malice the land would lie untilld, and the lessor be without remedy either by distress or action of debt.

S. C. 24 b.
Mann v.
Brace.
Cro. Jac.
334.

But lessor may accept the assignee for his tenant and so discharge the original lessee. And if *he once accepts rent from the assignee*, he can never again resort back to the first lessee.

But

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But the assignee is bound to the rent no longer than while in possession, and he may at any time assign over his term and so discharge himself; and if even to an insolvent person, it shall discharge him: for the action, as between lessor * and assignee is founded on the privity of estate, which is gone by the assignment. Lekew v. Nash. 2 Stra. 1221. Pitcher v. Toovey. Salk. 81. *P. 221.

But if a lessee for years dies, his executor or administrator may assign the term, and shall not be chargeable for rent after the assignment, for as they could sell the term to pay debts, so they can assign it, and be discharged from all subsequent demands of rent. And it was further held in this case, that if lessee for years assigns over his term and dies, the executor shall not be charged for rent due after his death; for by the death both privity of estate and contract was at an end. Marrow v. Turpin. Cro. Eliz. 715. Overton v. Syddall quot. 3 Co. 24. a. S. P.

2. If lessor grants away his reversion, he cannot have an action of debt for the rent, for he has granted the reversion to another, to which the rent is incident. So that grantee of the reversion alone can have the action. But if lessor had so granted his reversion, and lessee had assigned his term, grantee should not have debt against the lessee after assignment, for there was no privity between them, but by reason of the privity of estate, and that being gone by the assignment, the action will not lie. 3 Co. 23. a. Humble v. Glover. Cro. Eliz. 528. S. C. 3 Co. 23. b.

“ And it is the same whether the person claiming the rent comes in by succession or by grant.”

As where a prebendary made a lease, confirmed by dean and chapter, lessee died, and his executor assigned; afterward the prebend * died, and plaintiff being named his successor, brought debt against the executor of the lessee, and adjudged that the action would not lie, for the privity was gone by the assignment. Overton v. Syddall. Cro. Eliz. 555. *P. 222.

“ But where lessee assigns but a part, he is chargeable for the whole to the grantee of the reversion on account of the subsisting privity.”

For where Sir Christopher Broom let lands to Hoare, rendering rent; Hoare let to one Wriglesworth one fourth part of an acre: afterward Sir C. Broom granted the reversion of the whole to one George Broom (the now plaintiff) who brought debt against Hoare for the entire rent. It was contended for defendant that the privity being gone as to part was gone for the whole. But the court held the reverse, that the entire estate remaining in one part of the land, the privity remained entire, and would support the action. Broom v. Hoare. Cro. Eliz. 633.

3. If lessor in fee assigns over to another the rent of a term, and lessee attorns, the assignee of the rent may have debt for each gale in arrear, though the reversion is in the lessor and of course the privity of estate, for by the attornment there is a privity of contract. Robinson v. Cox & Warwick. 1 Lev 22.

So he may devise it, and devisee may maintain an action of debt for the rent arrear. Ards v. Watkyns. Cro. Eliz.

4. If 637.

D E B T.

Pultney v. Holmes. 1 Stra. 405. Raym. 99. 737. *P. 223. 4. If lessee for years assigns all his term to another, reserving the rent to himself, he shall have an action of debt for the arrears during the * term: for though not properly a rent for want of a reversion, yet it partakes of its nature, being a return for the profits which are annual.

5th. As to Sheriffs.

Speake v. Richards. Hob. 206. Hutt. 11. S. C. 1. Debt lies against a sheriff, where he has returned "that he has levied the money under a writ of fieri facias, or such. But otherwise if he returns, "that he has taken goods to such a value, which remain in his hands, pro defectu emptorum;" for in such case he shall not be charged in debt.

Mildmay v. Smith. 2 Saund. 343. So debt lies against a sheriff on his return of having seized goods to the amount of £. which were rescued out of his hands. For such is no excuse to any taking on final process, as he may command the posse comitatus.

Parkinson v. Gifford. Cro. Car. 387. And it lies in like manner against the executors of the sheriff, who had levied the money, at the suit of the plaintiff in the action.

Rooke v. Wilmot. Cro Eliz. 208. For when the sheriff has levied the debt or damages against the defendant's estate, the judgment against the defendant becomes immediately discharged, and therefore the sheriff must himself be liable.

Smith & Linsey. Hutt. 32. But the plaintiff in the action may have a scire facias against the sheriff, and not bring an action of debt.

*P. 224. * 2. Debt lies against a sheriff for the reward given by statute 6 & 7. W. and M. c. 23, on the conviction of coiners; the judge having certified the conviction, which must be proved.

† 3. Debt lies against a sheriff, where a person in custody on final process escapes, by the equity of stat. West. 2. and 1 Rich. 2. c. 12. by the party at whose suit the execution was.

Hawkins v. Plomer & Hart, Sheriffs of Middlesex. 2 Black. Rep. 1048. And where an action of debt is so brought against the sheriff on an escape, the whole sum for which the defendant was in custody at the time of the escape shall be recovered against the sheriff.

† And if the defendant was seen at large for any the smallest part of time, it is an escape.

And the action equally lies whether the escape was negligent or voluntary.

* Or whether the writ was returned by the sheriff or not.

For the cases on escapes at length, see *Trespass on the Case*, Chap. 13.

† 4. Debt lies at the suit of the sheriff for his fees for executing an elegit, and other fees to which he is entitled.

† And it is no objection that an elegit may not be a complete execution, for that plaintiff may be obliged to bring an ejectment to recover the possession.

Salk. 333.

And

D E B T:

* And if an *erroneous writ* be delivered to the sheriff, and he executes it, yet shall he have his fees. *P.225.

These fees arise under stat. 29 *Eliz. c. 4.* which enacts, that no sheriff or other person shall take more for executing any writ, extent, or execution on the body, goods, or lands of any person, than 12*d.* for every 20*s.* up to 100*l.* and 6*d.* for every 20*s.* after, that he shall levy or take the body in execution for, under penalty of treble damages to the party grieved; and 40*l.* half to the King, and half to the informer." Earl v. Plummer. Salk. 332.

As to which statute, it has been settled

1. That it extends only to *executions in personal actions*, not to real executions, as an *habere facias seisinam* or *possessionem*.
2. That on a *capias ad satisfaciendum*, the sheriff shall have his fees for the *whole debt*.
3. But in *elegit* it seems doubtful whether he shall have them for the whole sum or only according to the sum levied.
4. The statute does not extend to executions upon *statutes merchant* or *recognizances*; for the act is only to be understood of cases where the judgment *redditur in invitum*, not where it is by voluntary confession of the party. Peacock v. Harris. Salk. 331.

2. The statute does not extend to give costs in cases of execution out of inferior courts; so that for these the officer can not have an action of debt. Brockwell v. Lock. Salk. 331.

* 5. The sheriff may have debt against the *sureties in the bond given under stat. 23 H. 6. for defendant's appearance*; and it is no objection to such bond, that the surety had no lands in the county, for the bond is taken only for the sheriff's security; and the statute is silent as to the quality of the sureties, and only declares it void when not made in pursuance of the statute. *P.226. Cotton v. Weale. Cro. Eliz. 862.

Having now considered the grounds of this action; before I proceed to the pleadings, it is proper to observe on the time at which this action may be brought.

If a man be bound by bond to pay a sum of money at five several days, obligee shall not have an action of debt till all the days are past, for the contract is entire, so that the breach of it is not complete till all the days are past.

This is where the entire sum is due on a *single bond*, for if it be a bond in a penal sum, conditioned for the payment of money at different days; the condition is broken and the bond becomes absolute upon failure of payment at any of the days, and debt lies before the last day is past. Cotes v. Howell. Mic. 18G. 2. Buller N.P. 168.

But if a man be bound in a *recognizance* to pay a sum of money at five several days, presently after the first day of payment conuzee shall have execution on the recognizance for that sum, and shall not wait till the last be past; for it is in the nature of several judgments.

***P.227.** * 7. I shall now consider the PLEADINGS in this action; 1st. *With reference to the contract.* 2dly. *To the person.*

And first of the Pleadings on the part of the PLAINTIFF, considered with reference to the contract.

And first of those upon

Bonds.

1. "In debt on a *simple contract*, plaintiff should set out in his declaration *the promise or consideration* which is the ground of his action; but in declaring on a *specialty* it must be on a *certain writing obligatory, or deed sealed with his seal*, and conclude with a *profert*; for the bond or obligation is of itself sufficient."

Simonds v. Alexander. For where plaintiff declared upon a *certain agreement*, sealed, &c. by defendant and had judgment on *nil debet*. The judgment was arrested, for there was nothing in the declaration to support debt, for it could not be on promises, for no consideration was laid, nor was the agreement shewn to be by deed.

Thoresby v. Sparrow. And as the bond is the sole foundation of the action, the court must see that it is properly executed, as on it their judgment is to be founded; and therefore it is matter of substance that *profert* be made of it. And the defendant * being entitled to it by law, the court can in no case dispense with it.

Page v. Divine. And such *profert* the party demanding it has a right to within *two days* after demand; the day of demand and giving it both being exclusive: therefore when oyer was demanded on *Friday* and judgment was signed on *Monday*, the judgment was held to be irregular.

Trin. 27 G. 3. 2. "In an action on a bond, plaintiff should assign but a *single breach*, for so only can defendant know where to apply his defence."

African Company v. Mason. For where defendant being appointed agent to the plaintiffs, gave the bond in question, conditioning for the payment of all sums of money by him received to the use of the company; and the breach assigned was, "That defendant had received from *J. S. and several other persons, divers sums of money* which he had not paid to the company." It was held, that the assigning the breach in the receipt of *divers sums* from *several persons*, was too general and uncertain, and therefore badly assigned.

Gilb. Rep. 238. "But where *the transaction* upon which the breach is founded is *entire*, though it consists of many parts, a general assignment of a breach will be sufficient."

Corwallis v. Savery. As where in debt on a bond as security for a person appointed agent to a regiment, and the breach assigned was, "That defendant had received several sums of money from the paymaster-general, for the use of the regiment, which

2 Burr. 772.

D E B T.

* which he had not paid over to the officers according to their ***P.229.**
 respective proportions." This breach was on demurrer held
 to be well assigned, for the money was received from one
 person (not from many as in the last case) and for one purpose,
 to pay the regiment; and his omitting to pay *any part* of it,
 was a breach of the bond and sufficient.

" And where a single breach is assigned, it should be fully
 " and particularly stated *in what manner the breach accrued.*"

As where in debt on a bond conditioning for security for Jones v.
 the faithful service of a clerk and breach assigned, " That a Williams.
 " large sum of money, *viz.* 13*l.* came to the clerk's hands Dougl.
 on account of the plaintiff, which he (the clerk) had spent and ^{203.}
 embezzled." This breach was held to be ill assigned for not
 shewing, *how and from whom the money so embezzled had been*
received.

3. " The breach should always be so assigned that by no
 " presumption it shall be out of the condition of the bond ;
 " for so judgment might be given without cause of action."

As where in debt on a bond which conditioned, " That de- Stibbs v.
 fendant should take *his beer and ale only* from plaintiff, and Clough.
 pay for what he drew, but that he might take his other liquors 1Stra.227.
 from whom he pleased." In debt on the bond the breach
 assigned was, " that such a quantity of *liquors* was drawn and
 unpaid for." * On demurrer, the breach was held to be ill as- *P.230.
 signed, for it does not appear that the liquors unpaid for were
malt liquors, which only defendant was bound to take from the
 plaintiff.

" But the assignment of the breach need not be *in the*
 " *words of the condition*, if it appears to be within the inten-
 " tion or spirit of the agreement."

For where the condition of a bond was, " That defendant Bache v.
 should from time to time render a just and true account of Proctor.
 all monies received by him as treasurer of the parish of B. Dougl.
 &c." And the breach assigned was, that on the last account 367.
 furnished by the defendant there appeared to be due a large
 sum of money, which he had not *paid over*. Defendant de-
 murred for cause that the breach was not within the condi-
 tion which was only to *account* : but *per curiam*, the inten-
 tion of the parties, and fair construction of the condition is,
 that the money should be paid ; for to construe it a condition
 to enforce the making out a paper of *items* and figures is idle
 and nugatory.

4. " Where plaintiff brings debt on bond for performance
 " of any thing, if defendant pleads matter of excuse, plain-
 " tiff need not set out a particular breach, for the excuse ad-
 " mits the non-performance and justifies it."

As in debt on a bottomry bond, defendant craved oyer, Meredyth
 and the condition was, " That if such a ship returned in ten v. Alleyn.
 weeks and gave * an account of the profits of her voyage, that Salk.138.
 then *P.231.

D E B T.

then the obligation should be void." Defendant pleaded that the *ship was lost* and did not return; plaintiff replied, that the ship was not lost, and defendant demurred, for cause that there was no breach assigned; but it was adjudged, that defendant had made it unnecessary by pleading matter of excuse.

Per Holt.
S. C.

The only exception to this is, the case of an *award*; for in debt on a bond to perform an award, if defendant pleads matter to excuse the non-performance, the plaintiff must *set out the award and the breach*, for the award may be void in the whole or in part, and therefore the award must be set forth, not only that the court may see that there was an award, but also that the non-performance was of a good and not of a void part of the award, for that need not be performed.

5th. "Where a bond is in the *disjunctive*, a breach of "either part by act of the obligor forfeits the bond, and is "a sufficient assignment of the breach; for the law will supply those words *which shall first happen*."

Box v.
Day & Ux.
1 Will. 59.

As where defendant's wife, when sole, gave a bond to the plaintiff, which was in a penalty of 1200*l.* if she married *any other person* than the plaintiff, or refused to marry him within one month after the death of her father. Having married defendant in the life-time of her father, the plaintiff brought debt on the bond, assigning her marriage as a breach; and it was held to be good, though insisted, that "she might still perform one part of the condition by marrying the plaintiff after her father's death, as he might survive her husband.

*P. 232.

Bladwell v.
Huggin.
Dyer 219.

6th. "In debt upon any contract, plaintiff must declare "for the exact sum due by the contract, for there can be no "apportionment; but if the sum depends on something extrinsic, though the plaintiff may demand more than he has "a right to, yet he may enter a remittitur as to that part; "but where the whole arises from the deed it cannot be "done."

Incedon
v. Cripps.
Salk. 659.

As where plaintiff declared in debt for 182*l.* 10*s.* being a sum due by defendant under his covenant to pay 35*l.* per hundred for every hundred of wood delivered in such a place, and that he had delivered so many hundred and *one half*, for which the money was due. On demurrer the court held, that the demand for the half hundred was more than could be by the contract, for there could be no apportionment; but that a remittitur might be entered for that, it arising from matter extrinsic.

Dutch W.
India Com-
pany v. Ja-
cob Senior
Henriques
Van Moses.
1 Stra. 612.

7th. Debt is in its nature a transitory action, and a bond or other obligation entered into in any foreign country may be sued for in *England*. But in such case, if dated at a certain place, it then becomes local and the declaration should set it out as made at the true place with a "*viz.* at *London* in the Ward of *Cheap*, or where he means to try it."

Therefore

* Therefore where plaintiff declared that defendant by his ***P.233.**
bond *apud London concessit se teneri, &c.* to the plaintiff in *Roberts v.*
40*l.*; and on oyer the bond appeared to be dated at *Port St. Harnage.*
David in the *East Indies*, which was not mentioned in the *Salk.659.*
declaration; the variance was adjudged to be fatal.

And the reason of these cases seems to be, that where there
is an omission of the date, the bond produced in evidence does
not appear to be the same declared on: for a bond made in
London is not presumable to be the same with one made at
Port St. David's, and therefore the variance between the proof *BullenP.*
and declaration must be fatal; it being the constant practice 169.
to compare the declaration with the bond produced at the
trial.

" But if the deed produced is in substance the same with
" that declared on, if the declaration states matter of surplus-
" age or no way variant of the deed, it shall not vitiate."

As where plaintiff declared on a deed of covenant, dated *Holman v.*
the 30 of *March 1701 annoq. 13 regn. Gul. 3.* And on oyer *Borough.*
those latter words were wanting; on a demurrer for variance, *Salk.658.*
the court held it to be none, for the deed was implicitly the
same.

And in this case before, where plaintiff declared on the *Roberts v.*
bond *solvendum* to the plaintiff, and on oyer, it appeared to *Harnage.*
be *teneri* to the plaintiff for 40*l.* to pay to his attorney or assigns, *Salk.659.*
per cur. it is no variance, for payment to * the plaintiff or to ***P.234.**
his attorney is the same thing; the *teneri* made it a debt to
the plaintiff, and a *solvend.* to any one else would be repug-
nant.

" And this action being transitory, the court will never *Dupleffis v.*
" change the venu, except under particular circumstances." *Chalk.*

As where the party's witnesses are in a distant county, and *28Stra.878.*
then the court will annex conditions to the changing the venue, *Foster v.*
as undertaking not to bring a writ of error, or giving judg- *Taylor.*
ment of the preceding term. *Pasc.17G.*

And *Note*, That the breach being set out in the replica- *3. B. R.*
tion, the plaintiff can only alledge new matter in the specialty *Term.Rep.*
declared on, in his replication, *after setting it out on oyer*: and *781.*
therefore where plaintiff declared, on articles whereby defen- *Plen. in*
dant agreed to take his *malt* liquors only from him; defen- *Stibbs.*
dant pleaded performance and the replication, " That by the *v. Clough.*
same articles it was further agreed, that what should be drawn *18tra.227.*
should be paid for," and that such a quantity was drawn,
was held to be bad.

2. Of the Pleadings in Debt for Rent.

In declaring on a *lease at will* for rent arrear, the plaintiff *Bellasis v.*
must not only set out a demise, but also aver and prove *the Burbrick.*
entry and occupation of the lessee; for the rent is only due in *Salk.209.*
respect

D E B T.

***P.235.** respect of the occupation, and therefore it must appear * to the court, when lessee entered, and how long he occupied; but in debt for rent on a *lease for years*, though it is usual in the declaration to say "*virtute cuius, lessee entered,*" yet it is not necessary to set out such entry and occupation; for the action is grounded on the lease, and though lessee neither enters nor occupies, yet he must pay the rent.

But the want of setting out the occupation on a demise at will, must be shewed for cause of special demurrer, for it will be cured by a verdict.

Welbie v.
Philips.
2 Vent. 129.

2. If rent is reserved quarterly or half yearly, each gale is a distinct debt for which lessor may have his action, and may declare for the entire gale at the end of any quarter or half year, without shewing how the former quarter or half year has been satisfied: but if he declares only for part of the gale due at the end of any half year or quarter, it is bad, unless he shews how the remaining part was satisfied; for otherwise lessee may be exposed to many actions for the same demand.

Piltarfe v.
Darby.
Show. 8.

And whenever rent or any other duty is received quarterly or half yearly; the declaration should always state *when it was due and ending*, or it will be bad.

Hulm v.
Saunders.
2 Lev. 4.

So if rent is reserved annually, to say after *by even portions*, is idle and vain, and no action will lie for an *half year's rent*.

***P.236.**

And if plaintiff declares for less rent than a year, * without shewing how the rest was satisfied, it is bad, as in the last case.

Per Holt
Salk. 659.

But if more than is due is demanded, plaintiff may enter a *remittitur pro tanto*, for the demand depends upon something extrinsic.

Sands and
Tash v.
Ledger. 2
Ld. Raym.
792.

3. "Where plaintiff in his declaration undertakes to recite "a lease or demise, any misrecital is fatal."

In debt for rent, plaintiff declared on a demise "for 15*l.* per ann. rent under a power to make leases for 21 years."

And on evidence, it appeared to be a demise for 15*l.* per ann. rent, and *three fowls*, under a power to make leases for 21 years *in possession and not in reversion, rendering the ancient rent and not punishable of waste*: for this variance plaintiff was non-suited.

Shute v.
Hornsey.
quot.
Dougl.
643.

So where plaintiff declared on a lease *for three years*, and on evidence it appeared, that the lease for three years was void under the statute of frauds, and that defendant was only tenant from year to year: the lease for three years being laid and not proved, the plaintiff was nonsuited. *Vide Plen. Cas. Bristow v. Wright. Dougl. 640.*

Paterfon
v. Scott.
2 Stra. 776.

4. If the action is for rent *against the original lessee*, the venue may be laid either where the *land lies* or *where the deed was executed*. But if the action is against the *assignee of lessee*, it must be laid where the land lies, for he is chargeable only on the privity of estate.

D E B T.

* So against the executor of lessee, the action must be brought where the land lies, for he is chargeable as assignee on the privy of estate only. *P. 237.
Cormell v.
Liffett.

So debt for rent by the assignee of lessor against lessee, must be brought where the lands lie, though it is otherwise in the case of covenant, which is transitory. 2 Lev. 80.
Thrale v.
Cornwall.

And an executor is in like manner considered as an assignee, for arrears of a rent or rent-charge the action must be brought where the lands lie. *Sed Q.* If that is not for arrears due in his own time, and whether for arrears in the life-time of testator, the action is not transitory and may be laid any where. 1 Wilf. 165.
Pine v.
Lady Ley-
cester. Hob.
37.
1 Vent. 286
3 Keb. 155.

3d. Of the Pleadings in Debt on Matters of Record.

1. In declaring on a *bail-bond as assignee of the Sheriff*, the plaintiff need not set out, "that the debt sworn to was above 10*l.* and that for which the defendant was held to bail, was the sum marked on the writ according to stat. 12 Geo. 1." For the statute does not declare the proceedings void, but only prohibits the sheriff from taking greater bail than for the sum so marked on the writ: and if the sheriff acts otherwise, he is liable to an action at the suit of the defendant, or he may be discharged on common bail; but the bail-bond is still good. Whiskard
v. Wilder.
1 Burr. 330.

* 2. Neither is it necessary in declaring as assignee to state the assignment to be "in the presence of two credible witnesses" in the words of the statute, mentioning their names; nor is any proof of the assignment necessary, for it not a deed. *P. 238.
Lease v.
Box.
1 Wilf. 180.

3. In declaring in debt for an *amercement in a court leet*, the declaration ought to state that the defendant was an inhabitant within the leet, as well at the time of the amercement, as of the offence: but this would be cured by a verdict, as it must be proved at the trial. Wicker v.
Norris.
8 G. 2.
Buller N.P.
167.

4. "Where a matter of record is the ground or foundation of plaintiff's suit, there it ought to be certainly and truly alledged: but otherwise where it is but inducement or conveyance." Co. Litt.
303. a.

Therefore in debt on an *escape*, the plaintiff declared that the prisoner was committed and escaped, and because he did not say *prout patet per recordum*; defendant demurred generally, but the plaintiff had judgment, for the gist of the action was the escape, and the commitment only inducement. Waites v.
Briggs.
Salk. 565.

And *per Holt* in this case, in debt on a judgment, *quod cum recuperasset*, is good without, a *prout patet per recordum*; and defendant may plead *nul tiel record*. So that it seems not necessary to aver a record in the very words, as words tantamount as *quod cum recuperasset*, are sufficient.

"As therefore in declaring on matter of record where it is the gist of the action, it * ought to be certainly and truly averred, any variance shall be fatal." *P. 239.

Chetley v.
Wood.
Salk. 659.

As where plaintiff declared on a recognizance, acknowledged in the court of Common Pleas, before the Chief Justice, and *fociis ejus*, and upon *nul tiel record* pleaded. The recognizance produced appeared to have been taken before one of the *puisne Judges at his chambers*, and by him brought in and delivered into court; and the plaintiff was adjudged to have failed in his record; for the record as entered on the roll and produced was in fact as it was taken: but in such case there is a difference in the practice of the *King's Bench* and *Common Pleas*, for the *King's Bench* enters all recognizances as taken in court, so that they bind only from the time of being entered there. But the *Common Pleas* enters them specially as taken, so that they bind from the caption. And further, upon a recognizance in *K. B.* a *seire facias* lies only in *Middlesex*; but on a recognizance out of *C. B.* either in *Middlesex* or in the county where taken, and so the *venue* must be laid in an action of debt, either in *Middlesex* alone, if the recognizance was in *K. B.* but in *Middlesex*, or when taken if of the *Common Pleas*.

S. C. call'd
Shuttle v.
Wood.
Salk. 654.

Hull v.
Winchfield. Hob.
196.

5. If plaintiff declares in debt on a judgment, he must lay his *venue* where the judgment was obtained, as if plaintiff had judgment on debt or trespass at *Norwich*, he must lay his action on that judgment at *Norwich* and not in *Middlesex*; for the original debt or trespass is not now the ground of the action, but the record of that judgment which has created a new debt and is local.

*P. 240.

* And *Note*, in general, that in declaring upon *bonds or matters of record*, the declaration should always conclude with an *ad damnum* of the plaintiff, but in *debt for rent*, with a *per quod actio accrevit*. For in the first case the debt arises merely from the bond or judgment; but in the latter from something extrinsic, viz. the enjoyment of the land.

Marsh v.
Litler.
2 Mod. 41.

6. And as before in debt upon leases, the declaration on the judgments must be for the whole or shew how the rest was satisfied, or the declaration will be ill.

8. Of the PLEADINGS on the Part of the PLAINTIFF, considered with Reference to the Person.

And first as against the contracting Party himself or his Heir.

F. N. B. 119.

1. The declaration against the contracting party himself in all cases of debt, must be in the *debet et detinet*; for he is a debtor by the contract, and does a wrong by withholding what is due.

Goodwin
v. Newton.
1 Lev. 130.
Plowd.
440.

2. In the case of *bonds or where the ancestor* (the original debtor) *binds his heirs, &c.* the declaration against the heir must also be in the *debet et detinet*; for as he is chargeable *jure suo* by virtue of the original contract from having assets descended to him, he shall be charged as for his own debt.

“ But

*“ But as the heir is chargeable by reason of assets de- *P. 241.
 “ scended, he can discharge himself by shewing that he had
 “ no assets by descent; but he must shew this specially or he
 “ will be bound ”

For where in debt against an heir on an obligation made Barker v.
 by his ancestor, he let judgment go by default and a ca. sa. Bourn.
 issued against him, he brought error and assigned, that the Cro. Eliz.
 execution should have issued against the lands descended only 692.
 and not against his person: but it was adjudged, that the
 judgment should be general as his own debt, unless where he
 acknowledges the action and shews that he had so much only
 by descent.

“ And where the declaration is against the heir on the
 “ ground of assets it must state him as lineal or collateral heir
 “ according as he is.”

For where in debt on a bond against the defendant, as Jenks's
 brother and heir of J. S. the obligor, upon reins per descent in case,
 issue; it was proved, that J. S. was seised in fee and died Cro. Car.
 seised, leaving issue a son, who died without issue, upon 188.
 which the lands descended to the defendant as heir to the son;
 and the court held that the verdict was found for the defen-
 dant; for he has nothing as immediate heir to the obligor
 J. S. And if plaintiff would charge him as collateral heir,
 he ought to have made a special declaration.

*But where A. settled an estate upon himself for life, re- *P. 242.
 mainder to his first and every other sons in tail, remainder to Kellow v.
 his own right heirs; and entered into a bond and died, leav- Rowden.
 ing two sons, B. and the defendant; B. died, leaving issue Show. 244.
 a son, who died without issue, the defendant entered: he 3 Lev. 286.
 may be charged as heir to A. for he must make himself
 heir to him as last actually seised from whom the reversion
 in fee was assets.

But in debt against an heir, by an executor or administrator, Denham v.
 on a bond of his ancestor, the declaration need not shew how Stephen-
 he is heir, for the plaintiff being a stranger, it would be hard son.
 to compel him to set out another's pedigree: but where Salk. 354-
 plaintiff sues as heir he must set out his pedigree, for it is
 within his own knowledge.

But though the declaration against the heir should be in Comber v.
 the debet & detinet, yet if it be in the detinet only it will be Wotton.
 cured by a verdict. 1 Lev. 224.

2. Against Executors and Administrators.

“ If the declaration is against an executor or administrator, 1 Roll.
 “ it must be in the detinet only, for he is not personally liable, Abr. 603.
 “ but only in respect of the testator's estate; he therefore
 “ cannot be said to owe.

It is held however in this case, that if debt is brought Hargrave's
 against an executor for rent due in his own time, that it must Case.
 be 5 Co. 31.

D E B T.

***P. 243.** be in the *debet & detinet*. *But in the report of the same case in *Cro. Eliz.* 711. I find that decision was reversed in the Exchequer Chamber.

3 Lev. 74. However, after a judgment obtained against an executor, one may have debt in the *debet & detinet* suggesting a *devastavit*, and thereby charge him *de bonis propriis*; for being so liable to pay out of his own effects it is properly his own debt.

King v. Burrell.
Mich. 3G. 2.
C. B.
Buller N. P. 178.
2. In debt on a judgment against an executor suggesting a *devastavit*, the action may be laid either in *Middlesex* where the judgment is entered, or in the county where the *devastavit* is laid to be: but if defendant admits the judgment, but traverses the wasting, that issue must be tried in the proper county.

Buck v. Barnard.
Show. 348.
And Note, That an administrator may be declared against as *assignee*, in debt for rent, for the time that he enjoy'd the land and was in possession.

3d. By Executors and Administrators.

9 Ed. 4. 47.
1 Roll Abr. 917. A. 2.
Salk. 302.
1. An executor may bring an action before probate, but he cannot *declare* till probate granted, for when he comes to declare he must produce his letters testamentary: but an administrator cannot bring an action till administration granted, for the power of the first is derived from the will, that of the latter from the ordinary.

Sheperd v. Shorthose.
1 Stra. 440.
But if the probate has been lost, an exemplification from the ordinary will be sufficient.

***P. 244.** *2. Declarations by executors or administrators must be in the *detinet* only; for a person can only be said to owe to the person to whom the money when received would belong, that is, to the *testator's* or *intestate's* estate, not to his executor or administrator.

“And this is the case whether the action is founded on “a contract or tort.”

Hitchcock v. Skinner and Lacy, Sheriffs.
Cro. Eliz. 326.
As where it was in debt for an escape against the sheriffs, on a judgment obtained by the executors: the declaration, it was adjudged should be in the *detinet*; so where the judgment was obtained by testator himself.

1 Roll. Abr. 602.
†Spark v. Spark.
Cro. Eliz. 840.
†So where the action was debt for rent, the declaration must be in the *detinet*; though the rent in this case was on a demise which commenced on the death of the testator, so that he never received any rent.

“But where the executor makes himself chargeable to the testator's estate, there the declaration shall be in the *debet and detinet*.”

1 Roll. Abr. 602.
As if he sells the goods of his testator and brings debt for the money: so if he takes a bond for a debt due to his testator; but if where the debt was due by bond to the testator, he takes a fresh bond but with an additional obligor and payable at the same time, this should be in the *detinet*.

detinet only: for in such case he is not chargeable on his own account, as in the two preceding cases.

*3. In actions by an executor the declaration should state *P. 245. "That the testator was dead and he complete executor." Morfoot v. But if the executor has recovered and had a judgment, and Chivers. afterward brings a *scire facias* on it, such averment is not ¹ Stra. 631. necessary, though it would be otherwise, had the *scire facias* been on a judgment obtained by the testator himself: for by the first judgment his right was established.

4. So a declaration by an administrator is good, stating in Skidmore v. general, "that administration was granted to him by the Winston. "bishop of, &c. without saying that he was ordinary, or to Cro. Eliz. 879. whom the right of granting administration belonged: but if Gidley v. it is a peculiar jurisdiction, that should be so set out. And Williams. the reason is, that the defendant might contest the right of Salk. 37. the person granting administration, or shew that administration was granted to another, or that there were *bona notabilia*; but a verdict would cure the fault.

5. In a declaration by an executor of an executor, he Gradell v. should set out, "that the first executor proved the will;" Tyfon. for otherwise plaintiff has no title: for if there had been no ² Stra. 716. probate granted to the first executor, an administration *cum testamento annexo* should be granted of the effects of the first ¹ Salk. 305. testator, to the next of kin: but this would be cured by a verdict.

6. An executor should not join in the same declaration a Hooker v. demand by his testator and in his own right, or the writ will Quilter. abate; for the judgments would be different: that on the ² Stra. 1271. first *would be *de bonis testatoris*, that on the latter *de bonis* ¹ Will. 171. *propriis*. S. C.

*P. 246.

4. By and against Baron and Feme.

For a debt of the wife *dum sola*, as on a bond made by Walcot's her before marriage, the declaration must be against husband case. and wife in the debt & *detinet*: For as by the intermarriage ⁵ Co. 36. a. all the chattels of the wife belong to the husband absolutely, he is chargeable on that account with all her debts.

2. For personal things in action as a bond to the wife *dum Cro. Eliz. sola*, the husband may bring the action alone, or join the wife ¹ 33. as he thinks fit. Howell v. Main.

And Note. That though the wife is under age, yet the ³ Lev. 403. husband and wife may bring this action and appear by attorney: for the husband by law may make an attorney and appear both for himself and his wife. Humfrey v. Vaughan. Show. 13.

5th. By or against an Assignee.

1. "If the action is brought by the assignee of the reversion, against the lessee for rent, he must set forth the seisin
"in fee, in the first tenant, and the several mesne assignments,
"down to himself: for these are necessary to make out his
"title,

***P.247.** "title, and the validity of these assignments being matter of
Co. Litt. "law, ought to be set forth for the court to judge of." For
303. "it is a general rule, that estates in fee-simple *may be al-
"ledged generally, but the commencement of estates tail,
"and other particular estates must be shewn *where they go*
"to the ground of the action; but not so where they are only
"inducement. And so the life of tenant in tail or for life
"ought to be averred.

Cotes v.
Wade.
1 Lev. 190
Pitt v.
Russell.
3 Lev. 19.
S. P.

2. But where the action is by the lessor or his heir, *against the assignee of lessee*, plaintiff need not set out the several mesne assignments to the defendant, for they do not lie within his knowledge: but it is sufficient for the plaintiff, to set forth the original demise to the first lessee, whose estate and interest has by several mesne assignments come to defendant; and proof of possession and occupation shall be sufficient to charge him.

9. I shall now proceed to consider the

PLEADINGS *on the Part of the* DEFENDANT.

First, With reference to the Contract: Secondly, With reference to the Person.

1st. As to *bonds*, with reference to the contract, I shall premise,

Co. Litt.
225.

1. "That no *parol averment* varying the condition of a "bond, shall be admitted as a plea."

Hayford v.
Andrews.
Cro. Eliz.
697.

***P.248.**

As where to debt on a bond, defendant pleaded, "That before the day of payment, in consideration of a trespass done to him by *plaintiff's beasts, that plaintiff *had given to him a longer day for payment, which was not yet come:*" On demurrer the court held the plea ill, for no agreement by parol can dispense with an obligation.

Co. Litt. 36. a.
Whyddon's case.

Cro. Eliz.
520.

Holford v.
Parker.

Hob. 246.

Mease v.

Mease.

Cowp. 47.

So if the bond is delivered *to the obligee himself*, obligor cannot plead "that the delivery was not absolute, but conditional." For that would be variant from what appears on the face of the bond which is absolute.

So where to debt on a bond conditioned for payment at a day certain; defendant pleaded, "That the bond was given to indemnify the plaintiff's testator against another bond;" and on demurrer, the plea was held to be bad, for it is giving parol evidence to abate a deed.

Bro. saits.

10. Dr. and

Stud. Ch. 10.

"But when obligor has entered into a bond for payment of money absolutely, he may yet be discharged by a subsequent *instrument in writing.*"

Hodges v.

Smith

Cro. Eliz.

623.

As where to debt on a bond defendant pleaded, "That after the obligation, plaintiff *by his indenture covenanted*, that upon payment of 100*l.* that the first obligation should be void:" it was demurred for cause that the indenture being made after the bond it could not be pleaded in bar thereof, but should be taken advantage of by covenant, and that it should not enure by way of defeasance or release: but the court held it well pleaded in bar, and that circuity of action was to be avoided.

"But

* " But in such case it seems that such instrument should *P.249.
 " appear to be intended to operate as a defeasance of the first
 " obligation, as to say, " that on payment, &c. the first ob-
 " ligation should be void." For where there are no such Manhood
 words, a bond given at a subsequent day can never be pleaded v. Crick.
 in bar to one given before. Cro. Eliz.
 716.

" But where the bond has not been delivered to the obligee Cro. Eliz.
 " himself, but to a stranger, there defendant may plead any 520.
 " parol matter, as that it was delivered conditionally, or as an Co. Litt.
 " escrow. For delivery is one of the essentials to a deed, and 56. a.
 " it is not good and recoverable, unless it has been delivered
 " to the obligee himself."

And therefore where defendant so pleads the delivery as Anon. 1.
 an escrow, he should shew to whom he so delivered it, and Vent. 9.
 conclude & *essint nient son fait*. And therefore where defen- Ward v.
 dant only pleaded a delivery to T. S. " *et hoc parat. est veri-* Forth.
ficari." The plea was held bad, for it is a special *non est* Vent. 2. 10.
factum.

" In one instance modern practice has admitted an excep- Rudge v.
 " tion to the rules now laid down, that is in the case of Birch.
 " Trusts." For the courts of law now take notice of Trusts, Mich. 25
 and will allow a plea not consistent with the bond. As that G. 3.
 the plaintiff the nominal obligee in the bond is not the real Term. Rep.
 owner of it, but merely a trustee for another. 622.

* Therefore where a bankrupt had assigned his interest in a *P.250.
 debt, by a deed poll to a third person, he was notwithstanding Winch v.
 allowed to bring his action, for the benefit of the person Kebley
 to whom he had made the assignment, and recovered; for the Hil. 27 G. 3.
 statute 1 Jac. 1. c. 15. only gives to the assignees such things Term. Rep.
 in which the bankrupt has a beneficial interest, which in this 619.
 case he had not, being merely a trustee for another.

So that the point seems now settled. The first case in Bottomley
 which it occurred was this. To debt on a bond defendant v. Brook.
 pleaded, " That the bond was given to plaintiff for securing Mich. 22
 100*l.* lent to the defendant by one E. Chancellor, and was by G. 3. C. B.
 her direction made to plaintiff in trust for her, and that E. Term. Rep.
 Chancellor was now indebted to defendant in more than the 621.
 amount of the bond." To this was a demurrer, but it was
 withdrawn by advice of the court.

2. " But though defendant is estopped to plead any matter
 " contrary to the bond, yet he may plead a plea, which ad-
 " mitting the bond, yet shall avoid it, as that the consideration
 " was illegal. *ex. gr.*"

For where in this case it was attempted to be supported, that Collins v.
 defendant was estopped by his deed to plead any thing *dehors* Blantern.
 to avoid it, (as here, " that it was given to compound a profe- 2 Will. 344.
 cution for perjury,") the court held, that the estoppel only 2 Ref.
 went to prevent the party from pleading any thing contrary to
 the deed, but this plea admitted and avoided it. And in this
 case

***P. 251.** case the plea should conclude, * "that therefore the bond
" was void, not with a *non est factum*."

1. The first plea I shall consider on a bond is, that of *non est factum*. Which is to be pleaded under these limitations.
Thompson v. Leach. Salk. 675. 1. If the bond be void in itself, but that does not appear on the face of the deed, but depends on something extrinsic, (as if made by an infant or person non compos) in that case *non est factum* is a bad plea. For the court can only judge from what is before them, and the bond on the face of it appears to be good, such also is the case of *Dures*.

Whelpdale's Case. 5 Co. 119. Lord Ber- nard v. Saul. 1 Stra. 498. 2. So where a bond or other instrument is by an act of parliament enacted to be void, the obligor cannot plead *non est factum*, but the special matter should be pleaded, and advantage taken of the statute. And if the bond was given on an *un- lawful consideration*, the statute must be pleaded.
Colborne v. Stockdale. 1 Stra. 493. So if the bond was given for a *gaming debt*, the statute should be pleaded. And in this case the defendant in his plea should set out the game played at, and conclude *contra form*. *stat.* that the court may see that it was within the statute. So in pleading *simony* the agreement must be shewn.

Whelpdale's Case. 5 Co. 120. 3. But if a bond never was complete by delivery, as if delivered to another to the use of obligee, and being tendered, he has refused * it, whereby the delivery has lost its force :
*P. 252. or if made to a *feme covert*, and the husband has disagreed to it ; in these cases obligor (defendant) may plead *non est factum*. So though it was once his deed, yet if before action, it becomes no deed, either by *rafure*, *interlineation*, *alteration*, or *breaking off the seal* ; in these cases the defendant may plead *non est factum*.

And Note, That though *rafure* in general shall avoid a deed, if made by the obligee, or a *stranger*, without his *privity*, in a *part material*, or by himself, in a *part not material* ; yet an alteration by a stranger in an *immaterial part* will not avoid a bond, if done without the *privity* of the obligee.

Michael v. Cro. Eliz. 120. For this plea of *non est factum* is in the present tense, and therefore if true at that time plaintiff (the obligee) cannot recover, but if the deed was good when the plea was pleaded, but after issue joined the seal was pulled off, or the deed cancelled, yet shall plaintiff recover.

Colton v. Goodridge. 2 Black. Rep. 1108. 4. " From these cases it appears that on the plea of *non est factum*, questions of fact only arise, as the non-delivery, *rafure*, &c." But where the condition is void in law, defendant in such case should not plead *non est factum*, but pray over and demur, if the legal condition appears on the face of it : if not, plead the special matter to avoid it.

***P. 253.** * 2. The next plea I shall consider is that of

Solvit ad Diem.

1. " It was formerly the case, that as the money was to
" be paid according to the condition *at a day certain*, if that
" money

D E B T.

" money was not paid *at the day*, that the bond was forfeit,
 " nor could defendant under this issue *prove payment after the*
 " *day* : But it is now enacted by stat. 4 and 5 *Ann. c. 16.*
 " *f. 12.* " That where debt is brought on any single bill,
 " bond or judgment, if the money has been paid, though
 " neither at the day or place, yet if paid at a subsequent day,
 " such payment may be specially pleaded."

But if the defendant has paid the money before the day, Winch v.
 he may, to debt on a bond conditioned *to pay at a day certain*, Pardon.
 plead *solvit ad diem*, and give in evidence payment before the Mich. 1 G. 1.
 day, as he could not plead it; for if defendant was to plead Buller N.P.
 payment before the day the issue would be immaterial, for it 174.
 still left the presumption open that there might be payment *at*
the day. And therefore a difference is to be observed between
 pleading, where the condition of the bond is to pay *at a day*
certain, and where *at or before* such a day: for to the first,
 defendant may only plead *payment at the day*, for the reason
 now given; and beside, that the performance of a condition Tryon v.
 ought to follow the terms of it: but to a bond payable *at or* Carter.
before such a day, defendant may plead *payment before the day*; 2 Stra. 994.
viz. on such a day, for it is within the condition. And there Fletcher v.
 fore where it was so pleaded, and defendant demurred to * it Henning-
 as an immaterial issue; the court over-ruled the demurrer, ton. 2 Burr.
 and laid down the rule to be " That where defendant pleads 944.
 " performance of the condition, the plaintiff must assign an 1 Black.
 " absolute breach; though it is not necessary where he Rep. 210.
 " pleads a collateral matter (as a release); and that there S. C.
 " fore where defendant had pleaded payment before the day, * P. 254.
 " plaintiff should have replied, that the money was not paid
 " at the day mentioned in the plea, *nor at any time before, on,*
 " *or after that day.*" For by such issue alone can the pay-
 ment be tried.

" But under the statute nothing but an absolute *payment*
 " after the day is pleadable."

Therefore a *tender and refusal* of principal and interest at Underhill
 a subsequent day, cannot be pleaded in bar, as not being v. Mat-
 within the equity of the statute; for such construction would thews.
 be prejudicial, as it would empower the obligor, at any time Pasch. 1 G.
 to compel the obligee to take his money without notice. 1. C. B.
 Buller N.P.

2d. " *If no interest has been paid on a bond for twenty* 171.
 " *years*, it shall be in law presumed to be satisfied; and in 1 Burr. 434.
 " such case, defendant may plead *solvit ad diem*, and rely Cowp. 109.
 " on the presumption: And Lord Raymond has left it to the
 " jury on sixteen years, where there were circumstances to
 " fortify the presumption."

" Wherever therefore the defendant relies on this pre-
 " sumption of payment, the *onus probandi* lies on the plaintiff
 " to prove payment * of interest after the day, to rebut the * P. 255.
 " presumption."

For

D E B T.

Morland v.
Bennett.
1 Stra. 562.

For where in debt on a bond of 31 years standing defendant pleaded *solvit ad diem*, and relied on the presumption; plaintiff proved payment of interest two years after the thirty, but could prove none paid for the last twenty-eight years. Lord Raymond held, that this plea was to be taken strictly (that is here "paid thirty years ago") and that plaintiff having falsified defendant's plea, by proving the payment of interest two years after, was entitled to judgment: but that defendant should have pleaded payment, *after the day*, under the statute, in which case the presumption would have been in his favour.

"This plea when founded on the presumption is by the court taken strictly, and though they allow the presumption of twenty years to be of itself sufficient, yet if the time falls any thing short of that, they will require other circumstances to fortify the presumption of payment; as if an account had been settled between the parties and no notice taken of the demand."

Oswald v.
Leigh.
Trin. 26 G.
3. Term.
Rep. 270.

And therefore in this case where the bond was of nineteen years and a half standing, but no circumstances to induce a presumption in its favour; it was held to be no bar.

*P. 256.

"These circumstances (when the time is under twenty years) being matters of fact, as to the payment of interest, are proper * evidence to be left to the jury to decide on the presumption."

Searle v.
Lord Barrington.
2 Stra. 826.
2 Ld Raym.
1370. S.C.

For where the defendant relied on the presumption of non-payment of interest for twenty years, the plaintiff offered in evidence an indorsement on the back of the bond, being a receipt for interest on it ten years before the presumption accrued: This evidence was refused by the Chief Justice, on the ground, that it was the act of the obligee himself and so should not be admissible evidence; but the court granted a new trial, for it was proper evidence to be left to the jury, whether the indorsement of the receipt of the money was not made with the privity of the obligor, particularly as a receipt given in that manner is usual, as more safe than on a loose piece of paper: on a new trial the evidence was admitted and plaintiff recovered.

Turner v.
Crisp.
2 Stra. 827.

But where similar evidence of the indorsement of the receipt of the interest was tendered, but appeared to be *after the twenty years elapsed*, it was rejected as inadmissible evidence. For in the preceding case, the indorsement was admitted because it appeared to have been made at a time, when it could not have been thought necessary to encounter the presumption; but this was made after the presumption had incurred.

"And it has been held sufficient to obviate the presumption to shew a claim or demand of the money."

As

"Th
"has be
"point
"er ma
Vol.

* As where plaintiff shewed two writs of *testatum capias*, *P.257.
fued out by him before the twenty years run, but not served, Moyle v.
because defendant could not be found. Lord Mansfield in
this case said, there was no ground for the presumption. Ld. Roberts.
quot. 1 Term
Rep. 271.

† But if an action is brought on an old bond, as *ex. gr.* thirty
years standing, its execution must be proved as other bonds. †Forbes v.
Wale.

3. " Under this issue of *solvit ad diem*, what shall be
" deemed a payment, where defendant is indebted to the
" plaintiff in different demands, often comes in question. Up-
" on which these points have been settled. 1 Black. Rep. 532.

" 1. That *he who pays the money* has a right to direct to
what purpose it shall be applied."

For where defendant was indebted to the plaintiff in money Anon.
on a bond, and also for wares sold, and at the day of payment Cro. Eliz.
he tendered the money on the bond. The plaintiff took the 68.
money and said he would apply it to the payment of what was
due for the wares, but defendant said he paid it on account of
the bond; plaintiff afterwards brought debt on the bond, and
it was adjudged against him; for the payment is to be accord-
ing to the manner the defendant would pay it, not as plaintiff
would receive it.

Therefore where the point turned on payment of earnest, 2 P. Wms.
on which plaintiff relied, and defendant had pleaded, that he 308.
did not accept or receive it as earnest. The plea was over-
ruled, for it is not material how defendant received it, * but *P.258.
how the plaintiff paid it, for *quicquid solvitur, solvitur ad*
modum solventis.

" But there seems to be some diversity in the decisions at
" law, and in equity, where the debtor makes a payment ge-
" nerally, without appointing how the money is to be applied."

In equity it has been held, that if a man owes another mo-
ney on a security bearing interest, and on another bearing Heyward v.
none, (as by mortgage and simple contract) and he makes a Lomax.
general payment without mentioning whether it is to be 1 Vern. 24.
applied to one demand or the other; that it shall be taken to
be paid in discharge of the mortgage, for it is natural to sup-
pose, that a man would elect rather to pay off money bearing
interest, than that which carried none.

So where plaintiff was bound as a surety for J. S. in a bond Perris v.
to defendant, and J. S. was also indebted to him on simple Roberts.
contract; and they came to a settlement, in which it appeared 1 Vern. 34.
that J. S. was indebted on the balance of account in 85*l.* in
satisfaction of which J. S. made to defendant a bill of sale
of his effects: It was decreed, that the effects should go to
pay both demands in equal proportions and not to be applied
to one demand more than to the other.

" The decisions at law have varied from these, for there it
" has been held, that if the payer of the money does not ap-
" point to what * demand it is to be applied, that the receiv- *P.259.
" er may do it."

Goddard v. Cox. 2 Stra. 1194. As where one *Owen* was indebted to the plaintiff for coals; he died and made his wife executrix, who also became indebted to the plaintiff on her own account, and then married defendant, who continued to deal with the plaintiff, and made several payments on account. These sums, if applied to the debt contracted by the wife while sole, and that due as executrix would discharge both, and defendant having given no directions how the payments were to be applied, plaintiff insisted on applying them to pay those debts, and brought his action for the coals furnished to defendant in his own time: The Chief Justice was of opinion, that as the defendant had not directed the application of the payments, that the right devolved to the plaintiff, who might apply them to the wife's debt while sole; but as to the demands against her as executrix, as these depended upon assets and the manner of administering; plaintiff could not apply them to that demand.

"It is however to be observed on this case, that though the general doctrine is there laid down, that where the payer does not appoint that the receiver may; yet this case may well stand with the former, for the demands in this case were of the same nature, both simple contract debts, so that it made no difference to defendant in what manner the money was applied, which it would do where one demand bore interest and the other did not."

*P.260. So in this case, where defendant owed money on two bonds, and paid money on account, but gave no direction to which he would have it applied. The case was reserved, and it was determined, that plaintiff had the election, to which to apply it.

"And here it is again observable, that the securities were of the same nature, nor was it of consequence (as far as appears) to which bond the payment was applied."

"3. But if there is any relation between the fund from which the payment is to arise, and the security, the fund shall direct the appropriation of the payment."

Bret v. Marsh. 1 Vern. 468. As where defendant was an incumbrancer on an estate by judgment, and had also a debt by bond, and received 200*l.* of the purchase of the estate in part, but gave no notice to the purchaser, that it was to be applied to the payment of the bond debt: it was decreed to be applied towards satisfaction of the judgment, the 200*l.* being part of the purchase-money of the estate affected by the judgment.

3d. The third plea I shall consider is that of

Accord and Satisfaction.

5 Co. 117. b. 1. This plea must have two qualities, 1st. It must be such as the party agrees to accept, and be so pleaded: 2dly, it must appear to the * court to be a reasonable satisfaction, or at least the contrary must not appear.

*P.261.

"As

D E B T.

"As to the first, defendant should plead, that he paid such Paine v. Masters. 1 Stra. 573.
 "a sum of money, &c. in full satisfaction of the demand, and
 "that the plaintiff accepted it as such."

For it is not sufficient to say only, that plaintiff accepted it Hawkshaw v. Rawlings. 1 Stra. 23.
 as satisfaction, unless paid by defendant as such. Nor is it
 sufficient that defendant so paid it, unless plaintiff accepted it
 as satisfaction.

"So in the second case, it should appear that the satisfac-
 "tion was a good and valuable one, and it should therefore be
 "set out, what it was."

For where to debt on a bond defendant pleaded an accord Preston v. Christmas. 2 Will. 86.
 and satisfaction, viz. a release by him of an equity of redemption
 of certain premises mortgaged by him to the plaintiff, in lieu
 of all bonds, &c. On demurrer the plea was held to be bad,
 for an equity of redemption is of no value in the eye of the
 law, according to Littleton, Sect. 332.

"And for this reason the satisfaction must appear to be
 "complete and executed."

For where to debt on a bond, defendant pleaded payment Balston v. Baxter. Cro. Eliz. 304.
 of part before the day the bond became due, and a promise
 to pay the rest at a day to come, to which obligee had agreed:

* It was held to be no bar, for it was executory. *P. 262.

And therefore one bond cannot be pleaded in bar of ano- Sir Richard Lovelace v. Cocket. Hob. 68.
 ther, for that is of no greater value, unless the security or
 circumstances are bettered; as by shortening the time of
 payment.

The bettering the security alone, is not sufficient, for a Norwood v. Gripe. Cro. Eliz. 727.
 bond with sureties is better than a single bond, and yet the
 former cannot be pleaded in bar to the latter.

2. For the same reason payment of a lesser sum at the day Pinnel's case. 5 Co. 117.
 can never be pleaded in satisfaction of a greater, because by
 no possibility it can be a satisfaction; but the gift of a thing
 of less value, but different in quality, as of an horse or of a
 robe, &c. may well be pleaded in satisfaction: for these
 may be as beneficial to the party and valuable as the money.

So payment of a lesser sum before the day may be well S.C.
 pleaded in satisfaction: or if the money is to be paid at York
 and the party takes a lesser sum at London, that may be well
 pleaded in bar; for payment of a lesser sum before the day
 or at a different place may be of more value to the obligee,
 than the whole when due, or at the place where it was to be
 paid.

As to the form of the plea, defendant should plead the Preston v. Christmas. 2 Will. 86.
 accord and satisfaction of the money due by the bond and not
 of the bond itself: for a bond being a deed, shall only be
 discharged by a deed: but the payment of the money may
 * be discharged by matter in pais. And if a man acknow- Blake's case. 6 Co. 43.
 ledges himself satisfied by deed, it is a good bar without any Cro. Jac. 254.
 thing received. 117. b.

4. " That the debt has been attached in defendant's hands by *foreign attachment*, is another good plea to debt on a bond."

Upon which these decisions have taken place.

1. " That after plaintiff has commenced his action in the courts above, and defendant appeared ; the debt cannot be attached in defendant's hand."

Babington
v. Babington. Cro.
Eliz. 157.

For where the defendant pleaded a foreign attachment of the debt in his hands, *after appearance in the court above*, it was ruled to be a bad plea.

" But a creditor of the plaintiff may attach the debt due by the defendant while the creditor's suit is depending against the plaintiff in the courts above."

Leuknor v.
Huntley. Cro. Eliz.
593.

For where to debt on a bond defendant pleaded, that the debt due by him to the plaintiff had been attached in his hands in *London* by one *Jaques* ; plaintiff replied, that before the attachment *Jaques* had brought an action in Common Pleas against him for the same debt. On demurrer, it was resolved that the creditor of the plaintiff might well make such attachment, and that it therefore was a good plea in bar.

*P.264.
Dalton v.
Selly. Cro.
Eliz. 184.

* 2. A debt cannot be attached by foreign attachment *before it is due*, though the judgment on the attachment is not till after it become due. And therefore if defendant was to plead the attachment, plaintiff might reply this matter, that it was made before the money became due, and have judgment.

Sir John
Perrot's
Case. Cro.
Eliz. 63.

3. A debt *upon record* by recovery cannot be attached by the custom of *London*.

4. " If defendant pleads a foreign attachment, it should appear that the plaintiff in this action had notice of the proceedings in *London* to effect the foreign attachment, for as his property in the hands of his debtor is to be bound, he should be made a party, and have notice."

Fisher v.
Lane.
3 Will. 297.

For in this case where a foreign attachment had taken place, but it appeared that no notice had been given to the plaintiff, for that fault he had judgment. This case was that of an administrator, but the principle seems to be general.

Hulland v.
Malkin,
& al.
2 Will. 126.

5th. To debt on a bond to save harmless, defendant only can plead; *either that he has saved plaintiff harmless, or that if he has received any injury, it was through his own default.*

White v.
Cleaver.
1 Stra. 681.

And where defendant pleads that he has saved the plaintiff harmless, he should shew *how he had done so*. But as the saving harmless is the substance, and *how* matter of form, plaintiff should take advantage of the defect in the plea by *special demurrer*. And note, that in the case of a bond of indemnity

*P.265.

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nity it is not necessary that the same *should be sued*. For if Broughton's the surety pays the money without suit, the bond of indemnity is forfeited. Case. 5 Co. 24. a.

6. Bonds are within stat. 4 & 5 Ann. c. 16. which allows the defendant to plead double; and these pleas have been allowed. Where the condition of the bond was to marry on request; *non est factum*, and *never requested*, was allowed. Dunn v. Vacher & ux. 2 Stra. 907.

So *non est factum*, and a discharge under a commission of bankrupt, was allowed to be pleaded. Atkinson v. Atkinson. 2 Stra. 871.

But *non est factum* and *solvit ad diem* cannot be pleaded together, for they are incompatible. Arnold v. Baas. 2 Black Rep. 993. Co. Litt. 47.

2. I shall now proceed to

Pleas in Debt for Rent.

1. In debt for rent reserved by deed indented, the defendant never can plead *nil habuit in tenementis*; for he is estopped by his deed, which admits the demise. But had the demise been by the lessor by deed poll, lessee might so plead, for the deed is no estoppel as to him. Heath v. Vermeden. 3 Lev. 146.

2. So neither can he plead *non dimisit* where the rent is Ibid. reserved by indenture, for there too is an estoppel. Though for rent reserved by parol, he might so plead.

* 3. "In these cases, the rent being founded on the deed, *P. 266. the plea cannot contradict it; but where the deed is the inducement and matter of fact the foundation of the debt "there is some diversity." For defendant to debt for rent reserved by indenture may plead *nil debet*, which in the case of a bond, he could not do. For an indenture of lease does not acknowledge an absolute debt as a bond does, as the debt arises from the enjoyment of the thing demised. 2 L. Raym. 1503. Hard. 332.

So defendant may plead *non est factum*, for denying the existence of the deed, there can be no estoppel. S. C.

So though defendant may plead *nil debet*, yet he cannot give in evidence under it, that plaintiff had nothing in the tenements; because had he pleaded it specially, plaintiff could have replied the indenture, and estopped him; or plaintiff might demur; for the declaration being on the indenture, the estoppel appears on the record. 3 Lev. 145. Kemp. v. Goodall. Salk. 277.

If lessor accepts rent due at the last day of payment, and gives a discharge thereof and acquittance, this shall discharge all preceding arrears. So that such would be good evidence on *nil debet*. For it is not presumable that a man would give a receipt for the last gale of rent, when the former were unpaid. Co. Litt. 373. a. 3 Co. 65. b. 1 Sid. 44.

So if defendant pleads, *levied by distress*, and so *nil debet*, he may give in evidence a release or payment, and even though there never was any distress made, yet is the evidence of * payment or the release good; for the issue is on the debt. Gallaway v. Sufach. 1 Salk. 284. Sir Th. Cecil v. Harris. But Cro. Eliz. 140.

*P. 267.

D E B T.

But it is said in this case *per Holt*, that if defendant pleads *ra-
sure*, and so *non est factum*, nothing else is evidence but *ra-
sure*.

Theobald v. Warner. Cowp. 588. 4. "*Riens in Arriere* is a good plea in debt for rent, though it would be bad in *covenant for rent*," (*Hare v. Saville*, 1 *Brownl.* 19.) for in *covenant* such plea confesse the *covenant broken*, and goes only in mitigation of damages.

Bull. N. P. 182. 3 Danv. Under this issue the payment comes in question, and proof by defendant that *he had given a bond for the rent* to the landlord, which he had accepted, will not amount to a payment, for the accepting a security of *an equal degree* is no extinguishment of a debt (*ante* 262), and therefore cannot be so here, where the rent is due on a lease, which is an higher security than by bond. *Vid. post. Godfrey v. Newton.*

Harris v. Shipway, at Monmouth, 1744, per Abney. Bull. N. P. 182. And *a fortiori* that lessor accepted lessee's *note of hand* for the rent in arrear, can never be a discharge of the rent. Here lessor having taken such note, afterwards distrained, lessee brought trespass, and had judgment against him; for there was no alteration in the debt till payment of the note, so that the distress was lawful.

7 Hen. 6. 26. 5. "*Entry and Ejection* of the whole or any part of the premises demised, is a good plea in bar to an action of debt for the rent."

Hunt v. Cope. Cowp. 242. *P. 268. But a mere *entry* is not sufficient to cause a suspension of the rent, for such may be merely a trespass, and shall be so deemed: but it must be a tortious *entry and expulsion* so as to prevent an enjoyment of the premises. And therefore in this case, where the lessor entered on the premises and pulled down a summer-house, it was held to be no eviction, as to cause a suspension of the rent.

"And the *expulsion* must be specially pleaded."

Reynolds v. Buckle. Hob. 326. For where defendant pleaded only, that before the rent was due that plaintiff *had entered* on the premises, but did not say, that he had *expelled or kept him out of possession*, the plea was adjudged to be insufficient.

Taylor v. Beale. Cro. Eliz. 222. 6. If lessor had covenanted by deed to repair, to debt for the rent by lessor: lessee may plead, "That he had *expended the rent in necessary repairs*; which it seems by law he can do (though this was doubted by *Holt*, 1 *Ld. Raym.* 420. *Id. quare.*) But defendant must plead this special matter, and cannot give it in evidence in the general issue, for he might have covenanted on it against the lessor: but under the general issue defendant may give in evidence, *that he paid the rent to persons who had rent-charges out of the land*, by command of lessor; for payment by plaintiff's appointment is payment to himself.

Johnson v. Carre. 1 Lev. 152. But where there is an express covenant that lessee may deduct for charges and repair, in the same indenture; then clearly defendant may plead it in bar of debt for the rent.

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* 7. *The statute of limitations* is another plea, and is given *P. 269. by stat. 21 Jac. 1. c. 16. which enacts, That all actions of debt for rent arrear or grounded on any lending or contract without specialty, must be brought within *six years*.

But this only extends to rent due on a *parol demise*, for arrears due on an *indenture* of lease are not within the statute. Freeman v. Stacey.

Neither is it pleadable to any thing but simple contracts. Hutt. 109.

"Bonds are only barred by the twenty years and pre-sumption (ante 254). And to matters of record 'tis not pleadable."

For in debt against a sheriff for money levied under an execution, he cannot plead the statute; for though it is not a record till the writ is returned, yet it is founded on a record and hath a near relation to it. Jones v. Pope. 1 Saund. 37.

8th. "*Infancy* is another good plea in debt for rent; but "a *lease made to an infant* is not void, but *voidable* only at "his election on his coming of age: and if he does not "avoid it, but continues in possession, he is chargeable for "the rent."

Therefore where to debt for rent defendant pleaded in-fancy at the time of the lease made; on demurrer the court held, that the lease was voidable only at the election of the infant, by waiving the land before the rent day came; but he not having done so and being of age before * the rent day came, it was deemed an election and plaintiff had judgment. *P. 270. Kettley's case. Cro. Jac. 320.

3d. I shall now consider the

Pleas to Debt on Matters of Record.

1. Where debt is brought on a judgment, *nul tiel record* is the proper plea. And the issue is tried, by producing the record itself if it be a record of the same court; but if of another court, it must be certified into the court where the action is brought by *certiorari*. Hewson v. Brown. 2 Burr. 1034.

2. So to debt against a sheriff on an escape, *nul tiel record* is a good plea. For in such case plaintiff declares on a judgment. In this case plaintiff demurred to this plea, supposing that it should have been *nil debet*; but it was held to be good. Madox v. Young. Hob. 209.

But where a *fi. fa.* has issued to the sheriff who has levied the money, but not returned the writ, and plaintiff brings debt, defendant may plead *nil debet*; because it is then a matter of fact whether the money has been levied or not: but it is a bad plea if the writ has been returned, for then he is bound by the return. Cole 5. Acorn. Cal. K. B. 604.

2. In debt on a bail bond, defendant cannot traverse the arrest of the principal; for so all bail bonds that are civilly taken, (that is so as not to expose the party by an arrest) would be avoided. Watkyns v. Parry. 1 Stra. 444.

So

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***P. 271.** *So to debt on *scire facias* against the bail, "That the principal had paid the money," is a bad plea, except it be pleaded *on record*: for the condition is, "That defendant (the bail) should surrender the body or satisfy the debt, and this must be by the most sufficient satisfaction, that is by record."

Dodd v. Dawson. 2 Vent. 142. In a *scire facias* against the bail, it was held, that where the principal lay in gaol for two terms, and so might have been discharged by a rule, yet that where afterwards a declaration was delivered and judgment had thereon, that it was good to charge the bail.

2. These are the most material pleas distinctly applying to the several heads of bonds, leases, and matters of record. There are also others which are equally applicable to each of these heads, which now remain to be considered.

1. The first of these, is the

Plea of a Set-Off.

This was first given by stat. 2 Geo. 2. c. 22. which enacts, "That where there are mutual debts between the plaintiff and the defendant, or if either party sue or are sued as executors or administrators, where there are mutual debts between testator or intestate, and the other party, that one debt may be set off against the other, and such matter given in evidence on the general issue, or * pleaded in bar: but if intended to be given in evidence on the general issue, notice must be given of the particular sum intended to be set off; and upon what account it has become due." It was afterwards further enacted by stat. 8 Geo. 2. c. 24. "That mutual debts might be set off against each other, notwithstanding such debts were of different natures, unless in cases where either of the debts accrued by reason of a penalty contained in any bond or specialty; in which case, the debt intended to be set off must be pleaded in bar, and in which plea shall be shewn how much is truly due on either side; and in case plaintiff shall recover, judgment shall be entered for no more than appears to be due after one debt set off against another."

Cowp. 57. Under these statutes several decisions have taken place. 1st. "The debts which can only be set off against each other, are such as are certain and liquidated, and for such as *assumpsit* would lie, to recover."

Howlet v. Strickland. Cowp. 56. Therefore where to an action of covenant, defendant pleaded a set-off of other damages done to him by the plaintiff and unliquidated. The plea on demurrer was held to be bad.

Nedriff v. Hogan. 2 Burr. 1024. Freeman v. So where the *assumpsit* for 40*l.* lent, defendant pleaded articles of agreement with mutual covenants, in a penalty of 200*l.* for performance, and shewed a breach whereby the penalty

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penalty had * incurred and offered a sett-off. On demurrer the plea was over-ruled, and held not to be within the statute; for the penalty is not the whole sum, but sounds in damages which are uncertain. *Nyett. 1 Blac. Rep. 394. S. P. *P. 273.*

2. "The debt to be sett off must be a good and subsisting one when the action is brought," and therefore a debt barred by the statute of limitations cannot be sett off; and it be given in evidence on notice of sett off, the plaintiff may reply the statute of limitations; or plaintiff may object to it at the trial, if attempted to be given in evidence. *Buller N.P. 180.*

"It must therefore be an absolute debt due to defendant."

For where in debt on a bond, defendant pleaded a greater debt in bar, upon which the plaintiff prayed to have the condition of the bond enrolled; when it appeared to be a bond given to defendant, who was an officer of the palace court, for plaintiff's appearance at Westminster. On demurrer it was held, that this bond was not within stat. 8 Geo. 2. for that statute relates to bonds for the payment of money, and not to bail bonds: neither was it within the statute 2 Geo. 2. because plaintiff did not bring the action in his own right (he being an officer) but a trustee for another. *Hutchinson v. Sturges. Trin. 14 G. 2 C.B. Bull. 179.*

But if the bond had been given to the sheriff and by him assigned to the plaintiff, it had been otherwise, for then the penalty would be considered as the debt, which the party might sue for as assignee of the sheriff, under statute 4 and 5 Ann. c. 16. *Lofing v. Stevens. Mich. 1753. Buller N.P. 180. *P. 274.*

3. "The debts which can be sett off must be such as are due in the same right."

Therefore in an action of debt against a man on his own bond, he cannot sett off a debt due to him in right of his wife. *Paynton v. Walker. Pasch. 4 G. 2. C. B. Buller N.P. 179.*

So where defendants were insurance brokers, and the bankrupt before his bankruptcy had underwritten for them several policies on the goods, the property of others, which had been losses, and for which the bankrupt was liable: to an action brought against the defendants for money due to the bankrupt, they pleaded a sett off of these losses: but it was held, that the losses being on goods the property of others, that the debts were properly to them, not to the brokers, and therefore could not be sett off to a demand against the broker himself. *Wilson A.L. of Fletch. v. Watson and Creighton. Mic. 23 G.*

So where plaintiff's testator appointed defendant his attorney to collect his rents, and after his death defendant received rent which was in arrear in testator's life-time: plaintiff who was executrix, brought an action for the money in her own name; and defendant gave notice to sett off a debt due by testator to him: but he was not allowed to give it in evidence on the trial, for the rent was due to the executrix, *Shipman v. Thomas. Pasch. 11 G. 2. C. B. Buller N.P. 180.*

D E B T.

trix, and never belonged to the testator, so that he never had any cause of action against the defendant, as the money was not received till after his death, and the money intended to * be sett off was a debt *by the testator himself*, and so the rights were different.

*P. 275.

Brown v.
Holyoak.
8 G. 2.
Buller N. P.
179.

But where the testator has been indebted in his lifetime to the defendant, there the debt is clearly within the statute to be sett off; and in such case, the executor may admit such sett off without bringing an action.

4. "Money recovered by judgment may be sett off."

Baskerville
v. Brown.
2 Burr. 1229

In this case there were cross actions, *Baskerville* against *Brown* for 10*l.* and *Brown* against *Baskerville* for 30*l.* on notes; and both were to be tried at the same Sittings. *Brown v. Baskerville* came on first, and *Brown* had a verdict for 30*l.* he had given notice of a sett-off on the notes: It was held, that on the second action *Brown* might give the former verdict in evidence, and bar *Baskerville's* demand by so much of it as amounted to the whole of it, and enter a *remittitur* on the first record for so much.

Thrustout
ex. demif. of
Barnes v.
Crafter.
2 Black.
Rep. 826.

So where the lessor of the plaintiff had a judgment for 40*l.* debt and costs, in a suit of the preceding term for the use and occupation of an house; and in the next term was non-suited in an ejectionment against the same defendant; the costs of which were taxed to 12*l.* The court on motion ordered, that one demand should be sett off against the other.

*P. 276.

Barker v.
Braham.
2 Black.
Rep. 869.
3 Will. 396.
S. C.

In these cases the two judgments to be sett off were in the same court; but in this case, where * defendant had a *judgment in the King's Bench* for 102*l.* against the plaintiff, and plaintiff had a *judgment in the Common Pleas* for 106*l.* This last court allowed on motion, one to be set off against the other.

Collins v.
Collins.
2 Burr. 820.

5. If debt is brought on a bond conditioned for the payment of an annuity, defendant may have a set-off against the arrears of the annuity due at the time of the action brought; and the bond is not thereby discharged, but remains as a security for the growing arrears.

6. "If defendant gives notice of set-off, it must be certain
"as to every matter whereby it accrues."

Fowler v.
Jones.
Sittings at
Westminster.
Hil. 8 G. 2.
Buller N. P.
179.

Therefore where the notice of set off, was in these words, "Take notice that you are indebted to me for the use and occupation of an house for a long time held and enjoyed, and now lately elapsed." The debt intended to have been sett off was *rent reserved on an indenture*, which not being mentioned in the notice, the court would not admit it in evidence; for if it had been shewn, the plaintiff might probably have proved an eviction or some other matter to avoid the demand. These notices should be almost as certain as declarations.

Cook v.
Dixon.
B. R. 1735.
Bull. N. P.
179.

From hence it appears, that where the plea of sett-off is of an equal sum to that declared for, the action is barred: but where it is of a lesser sum than that for which the action is brought, defendant must pray to have it sett off.

And

D E B T.

* And *Note*. That as stat. 2 *Geo. 2.* requires notice where *P. 277. the defendant means to give a sett-off in evidence, where in Blackburn this case defendant had pleaded the general issue, but forgot v. Matthias. to give notice; he was allowed to withdraw his plea and give 2 *Stra.* 1267. the notice.

7. The statutes of sett-off are extended to *Bankrupts* by Cowp. 135. stat. 5 *Geo. 2. c. 30. s. 28.* which enacts, "That where it shall appear to the commissioners, that there has been a mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person before the bankruptcy, the commissioners or assignees shall state the account between them, and one debt may be sett against another; and what shall appear to be due on the balance, and no more, shall be claimed or paid on either side."

Though under this act of parliament the commissioners have a power of making and allowing a sett-off, yet it does not prevent the right of pleading or giving notice of a set-off to an *action at law*; for if the assignees bring an action for a debt due to the bankrupt estate, defendant may plead a sett-off of a debt due to him by the bankrupt. *Ridout v. Brough.* Cowp. 133.

"But the debts only which can be sett off in this case, are such as were mutual debts from and to the bankrupt at the time of the bankruptcy, and for which there were at that time mutual remedies."

* For where to an action by the assignees of a bankrupt defendant gave notice of sett-off, and at the trial produced a note given by the bankrupt prior to his bankruptcy to one *March, Assignee of Scott*, and indorsed by *Scott* to the defendant; but it appearing in evidence, that the indorsement had been made *subsequent to an act of bankruptcy*, it was held, that this could not be sett off; for there never was any debt due by the bankrupt to the defendant, and he could not be in a better situation than the indorser of the note, who could only have come in as a creditor under the commission. *Hay v. Chambers.* 2 *Stra.* 1234.

In the case of *Ryal v. Larkin*, 1 *Wils.* 155, and *Buller N. P.* 181, it is laid down as law, that the statutes of sett off do not extend to the assignees of a bankrupt, and it is on the ground, that, if the assignees brought an action for money due to the bankrupt, that as defendant could not have an action against them, but must prove the debt under the commission or proceed at law against the bankrupt himself, that therefore the defendant should not be allowed to sett it off. This doctrine is over-ruled as a general one in *Cowp.* 135. But the case itself seems to be reconcileable to the principle now laid down, viz. "That the debts to be sett off must be mutual at the time of the bankruptcy."

The case was, that to an action for goods sold by the assignees to defendant, he pleaded a sett-off of a debt due by bond to him by the bankrupt before his bankruptcy, which was disallowed, *Vid. same Cas. Bul. N. P.* 18.

***P.279.** *disallowed, and the reasons seem to be, first, that there was no debt due *to the bankrupt*; it was to the assignees, and so there were no mutual debts at the time of the bankruptcy. And secondly, that if this was allowed, a creditor might buy up the bankrupt's effects from the assignees under their sale, and if allowed to hold the price as a sett-off to his own debt, he might get twenty shillings in the pound, which would be a fraud on the bankrupt laws.

8. "In general, a sett-off is only pleadable or to be taken advantage of, where the action is for money, either *expressly ascertained* as debt, or in the form of *certain damages*, as covenant for rent arrear."

Absolem v.
Knight.
Pasch. 16
G. 2. C. B.
Bull. N. P.
181.

For where in *replevin* the avowant justified under a distress for rent, the plaintiff insisted at the trial that there was more due to him than the rent amounted to, which he endeavoured to take advantage of. Justice *Denison* refused the evidence, and on a motion for a new trial, the court held that the statute 2 Geo. 2. did not extend to the case of a distress, which was not properly an action, but a remedy without suit; they likewise declared that it did not extend to detain, and the like actions of wrong.

Gower v.
Hunt. Bull.
N. P. 181.

But where the action was covenant for non-payment of rent, defendant pleaded *non est factum*, and gave notice of a sett-off, the judge was of opinion, that it could not be given in evidence on this issue. But on a motion for a new trial the court held, that the evidence ought to have been admitted; for the general issue mentioned in the statute, must be understood to be any general issue, and a new trial was ordered.

***P.280.**

2. The next general plea I shall consider is, that of

A Release.

Litt. sect.
322, 513.

1. If a man be bound by his deed to another to pay him a certain sum at Michaelmas following, and before that time obligee releases to obligor all actions, he shall be barred of the duty for ever, and yet he could not have an action at the time of the release made. But if a man lets land to another for a year, yielding rent at Michaelmas, and before Michaelmas lessor releases to lessee all actions, yet after the feast lessor may have his action for the rent, for the release does not discharge it; and the reason is, that the first is a debt at the time for which obligor has then a right of action, though it is *solvendum in futuro*: but the rent is no debt till the day on which it is payable, for it is payable out of the profits of the land, and if lessee is evicted before the day, no rent is due. But lessor may discharge lessee of the rent before the day by a special release.

Co. Litt.
292. b.

Stephens &
ux. v. Snow.
2 Salk. 578.

So a release of all demands will not operate to release rent before it comes due, for then there is no demand. But it will release rent then due.

2. In

D E B T.

* 2. In the case of *bonds*, if there are two obligors a release to one is a release to both, as well at law as in equity. For it releases the contract. *P. 281.
Bower v.
Swadlin.
1 Atk. 294.

But if a man be bound to another in a bond, and obligee makes a covenant, binding himself not to sue the obligor for 99 years, this shall not operate as a release or defeazance, but merely as a covenant *not to sue*, and therefore is not pleadable in bar to debt on a bond. Aloff v.
Scrimshaw.
2 Salk 573.
1 Show. 46.
S. C.

But a deed of defeazance by which plaintiff covenanted in consideration of 100*l.* to be paid at a future day, to discharge the defendant of the bond in question, was held to be a good bar. Hodges v.
Smith.
Cro. Eliz.
613.

“ Though a release of all demands will discharge a bond, “ a distinction is to be observed when it is of demands against “ the person and against the estate, for if not a demand “ against the estate such a release will be ineffectual.”

For where to debt on a bond against an administrator be pleaded, that plaintiff had released all right, title, interest and demand against the personal estate of the intestate. On demurrer this was held to be no plea. For *per Holt*, there is a difference between a release of all demands to the person of the administrator and to the estate. Here the release is to the estate, and void, for it is not any right or demand against the personal estate, till judgment and execution sued out. Topham v.
Tollier.
Salk. 575.

* A release cannot be given in evidence without pleading. For it being a discharge by deed, all legal solemnities must be shewn to the court. *P. 282.
Dyer. 28.
12 Hen. 8. 1.

3d. In case of records, if a man is bail for another, and before judgment, plaintiff in the action releases to the bail all actions, duties and demands, it is no bar; for there was no duty against him till judgment against the principal. Hoc's case.
5 Co 70, 6.

3. A third general plea in this action is a

Discharge under an Act of Insolvency, or Certificate as a Bankrupt.

The acts of insolvency are occasional ones, but usually enact, “ That any person whose debts do not amount to 100*l.* “ may, on giving notice fourteen days before to his creditors, “ and delivering up upon oath all his effects (his bedding, “ apparel and implements of his trade only excepted) be discharged on petition to the court, from whence the process “ issued, or to the sessions.”

1. “ This act is always construed favourably for the “ prisoners,” and therefore where the prisoner had not given fourteen complete days notice, unless the days of the notice and bringing up were construed to be inclusive; the court held that they might be so. Morley v.
Vaughan.
4 Burr.
2525.

2. “ The act discharges the insolvent debtor of debts not “ due at the time of the taking place of the statute.”

As

*P.283.

Workman
v. Leake.

Cowp. 22.

Paget v.

Wheate.

Quot.

Cowp. 23.

Cottrell v.

Hooke.

Dougl. 95.

Haughton

v. Shell-

cross. 3

Lev. 190.

Laborde v.

Pegus.

Mich. 1772.

at West.

Gylom &

ux. v. Stir-

rup. Trin.

9 Geo. 2.

B. R. Bull.

N. P. 173.

*P.284.

† Savage v

Field. Mic.

9 G. 2. Bul-

ler N. P.

173.

Gilbert v.

Bath. 1

Stra. 503.

Co. Litt.

283. a.

• As where he was indorser of a promissory note, which had three months to run at that time. He was held to be discharged, for it was *debitum in presenti solvendum in futuro*.

So where the act commenced the 28th of January, 1778, and the bond, in which the person was bound, was dated September 21, of the preceding year 1777, and was due in September 1778, it was held to be discharged under the statute.

But where there is a bond with a penalty, and also a deed of covenant, and the defendant takes the benefit of the act of insolvency, whereby the bond is discharged, he is still liable on any future breach of his covenant, unless specially saved by the statute.

3. "If defendant pleads a discharge under the act, he should bring himself clearly within it." For when he pleaded that he was imprisoned on the day mentioned in the act, but did not say for what, it was held to be ill, for he might have been so imprisoned for a fine to the king for a contempt, which would not be discharged by the act.

4. In an action by the assignees of an insolvent debtor, the certificate made at the sessions is *prima facie* evidence of a due discharge, and of all the proceedings under the insolvent act; and if there has been any fraud or irregularity in the proceeding, it lies on the defendant to shew it. *As want of notice: Collusion, &c.*

*† And where in debt upon bond defendant pleaded the insolvent debtor's act, plaintiff replied that there was no notice given to him pursuant to the act; and issue being joined thereon, the summoner being dead, the duplicate of the proceedings before the justices was held to be evidence, because the notice was not a matter on which to found their jurisdiction, if it had been so, that evidence would not have been sufficient. But in this case, they are judges of the sufficiency of proof of notice, it being part of their jurisdiction, and consequently their duplicate of its being a good notice, will be good evidence; the summoner being dead.

1. Having now considered the several pleas in this action with reference to the contract, the Pleas with reference to the Person now remain.

I shall premise a few cases on the nature of joint and several bonds or securities.

1. If two are bound jointly in a bond, and one only is sued, the other must take advantage of it by pleading in abatement; for if he demands oyer and demurs, plaintiff shall have judgment, for the court will presume that the other never sealed it.

And in such case where one only is sued, he cannot plead *non est factum*; for it is his deed, though not his sole deed.

And

And therefore where defendant does so plead this matter *P.285.
in abatement "that another was bound *with him." He Hollingsf.
must plead further, "That the other *did seal and deliver* it worth v.
as his deed," or the plea will be bad, for by such means only Alcue.
is the deed good, and without such averment the court will Cro. Eliz.
presume that the other never did seal it. 55.

If several are bound together in a bond or deed (as *ex. gr.* Matthew-
merchants in a charter-party) but *they covenant separately*, if son's Case.
the seal of one of the merchants is broken off, it shall not 5 Co. 22. b.
avoid the deed as to the others, for the several covenants are
as several deeds, but had they been bound jointly it had been
otherwise: but where they do covenant severally, if a *rafure*
is made, it shall avoid the deed as to all; for that affects *the*
deed itself, without any difference to the parties.

2. If a bond be made to several, they must all join in an Spencer v.
action, for their interest is joint and they cannot have several Durant.
actions: the bond in this case was to the plaintiff and another, 1 Show. 8.
& *cuiuslibet eorum*, that is joint and several.

But if the bond is so, and one only brings the action, de- Ham and
fendant must take advantage of it by pleading *in abatement*, Paget v.
for if he pleads it in bar it is bad, and plaintiff shall have Hitchcock.
judgment. Cro. Eliz.
202.

1. Of the Pleas in this Action by the Heir.

"As the heir is chargeable only where he has assets by
"descent; if he has none, the proper plea is *riens per de-*
"cent, and this shall refer *to the time of the ancestor's death. *P.286.

"For it is enacted by stat. 3 and 4 W. & M. c. 14. That
"if the heir alien before action brought, yet he shall be
"liable to the value of the land, and if he pleads *riens per*
"descent, the plaintiff may reply that he had lands from his
"ancestor before the original brought or bill filed; and if
"upon issue joined thereon, it be found for the plaintiff, the
"jury shall enquire of the value of the land descended,
"and thereupon judgment be given and execution awarded
"as aforesaid (*i. e.* to the value): but if judgment be given
"by confession of the action, without confessing assets de-
"scended or upon demurrer, or *nihil dicit*; it shall be for
"debt and damages, without any writ to inquire of the
"value of the land descended."

1. "The replication under this statute should be merely
"on the descent of the lands, not of their sufficiency to an-
"swer the debt; for of that the jury are to enquire under
"the former issue."

For where defendant pleaded *riens per descent*, *al temps del* Jefferies v.
original and plaintiff replied, that defendant *had sufficient* Barrow.
lands before the time of the original purchased; and on issue Pasc. 12.
thereon, plaintiff had a verdict; but *there was no enquiry of* Ann. Buller
the value of the land. The court awarded a replender, for N. P. 176.
the

the issue should not have been joined on the sufficiency of the land descended.

2. "The heir cannot have two defences, the one by
*P.287. "common law the other by statute."

Winder v. Barnes. Pasc. 15 G. 2. Buller N. P. 176. "For if to *riens per descent* the plaintiff replies, that before the time lands descended, the heir cannot rejoin that he sold them and paid bond debts to the amount: he ought to disclose the whole in his bar at once.

Sherwood v. Adderley. 1 Ld. Raym. 734. But in debt on a bond against the heir, on the issue of *riens per descent*, he may give in evidence an *extent* against him on a bond owing by his father to the King: but it will be necessary to produce the bond or a sworn copy of it.

Buckley v. Nightingale. 1 Stra. 665. 3. Where the heir has lands by descent, if he *pays the debt of his ancestor to the amount of the value of the lands*, he shall hold them discharged: and this special matter being pleaded shall be a good discharge, for he is not chargeable farther than the value of the lands descended.

4. By stat. 3 and 4 W. & M. c. 14. "If the ancestor devises away his lands to a stranger, and dies indebted by bond or other specialty, the lands shall be liable in the hands of the devisee; and the action shall be brought against him and the heir jointly." And *Note*, That if the ancestor devises his estate to his heir, and the tenure and quality is the same, and the limitations unvaried, though *charged with his debts*, the heir shall be in by *descent*.

Gooch's case. 5 Co. 60. a. So if the ancestor makes a *voluntary settlement* under which the heir claims, but which is void against creditors by stat. 13 Eliz. c. 3. In such case the heir shall be in by *descent*.

*P.288. * 2. *Of the Pleas by Executors or Administrators.*

1. "The first is that of *retainer*. For by law an executor or administrator is entitled to retain for his own demand against all others of equal degree."

"And this whether the debt is due to him in his own right, or as *trustee* for another."

Plumer v. Merchant. 3 Burr. 1380. For where defendant was *co-trustee in his intestate's marriage settlement*, in which intestate was bound to defendant by bond, in a penalty to leave to his (intestate's) wife 700*l*. He died intestate, defendant administered to him, and being sued by plaintiff on a bond for 200*l*. it was adjudged, that as plaintiff's demand and his own were both in the same degree, and as he might as such have paid to the other trustee to the amount of the bond, that therefore he might retain as administrator, although no demand had been made against him either by the wife or her other trustee.

S. C. Bond v. Green. Brownl. 75. And it was secondly further held, that the defendant might either plead a *retainer* or give it in evidence on *plene administravit* pleaded.

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So where defendant's husband covenanted with her father *Loane v. Casey, Exr. 2 Black. Rep. 965.* as trustee for her, on her marriage, to leave her his personal estate and 200*l. per ann.* She administered to her husband: it was resolved, that she had a right to retain so much of the husband's effects as would answer * the covenant. And 2dly, * *P. 289.* that she might give this retainer in evidence on the general issue. And Ch. Justice *De Grey* there quoted a case as decided, that where a widow executrix had paid off a mortgage on her jointure, which the husband had covenanted to be free from incumbrances, that she might retain to the amount of the sum paid off.

" But this privilege of retainer is only allowed to a rightful executor or administrator."

For an executor *de son tort* cannot retain. For so would he have advantage of his own wrong. *Coulter's case. 5 Co. 30.*

Therefore if defendant pleads a retainer, he ought to shew that testator had made him executor, and it is not enough to say, that testator made his will, and that he, *suscepto super se onere testamenti*, paid divers debts, and retained for a debt of his own. If he pleads so, plaintiff may either demur specially for that cause, or reply that he was executor *de son tort*. *Atkinson v. Rawson. Mich. 27 Car. 2. C. B. Bull. N. P. 143.*

Though when plaintiff so replies, that he was executor *de son tort*, defendant may plead *puis darrein continuance*, that he had since obtained letters of administration, for such administration will legitimate all intermediate acts, and justify a retainer. *Vaughan v. Brown. 2 Stra. 1106.*

But where administration has been granted to a creditor, and afterwards repealed at the suit of the next of kin, the creditor may retain against the rightful administrator, for where administration is granted to a wrong person, it is * only voidable, but if granted in a wrong diocese it is void. *Simpson v. Tresler, in Kent. 1661. per Weston. Bull. N. P. 141.*

And as to what shall constitute a man executor *de son tort*, * *P. 290.* these points are settled.

1. If a man dies intestate, and a stranger takes his goods, Read's case. and uses them, or sells them, this shall make him executor *de son tort*. *5 Co. 33. b.* 2. But when an executor is made, and he proves the will and administers, if a stranger takes the goods of the testator, and claiming them as his own, uses them, or disposes of them, this shall not make him an executor *de son tort*; but if such stranger, where there is a rightful executor, takes the goods, and claiming to be executor, pays money or legacies, or receives debts, there he shall be charged as executor *de son tort*. Or, 3dly, if an executor is appointed and a stranger takes the goods, and meddles with them before the executor proves the will, he shall be charged as executor *de son tort*. *Salk. 313.*

2. A second plea by executors is that of

Plene administravit.

Under this issue it is material to consider, 1st. The order in which debts are to be paid by executors. 2. The manner of pleading the payment of such debts.

P.291. 1st. *Of the Order in which Debts are to be paid.*

2 Black. 1. An executor is bound to pay according to the rank of the
Comm.511. debts; that is, after funeral expences, first, *debts of record*, or
by specialty due to the king. 2. *Debts by particular statutes*
having precedence to others; as forfeitures for not burying in
woollen; for poor's rates; for letters due to the Post-office,
and some others. 3. *Debts of record*; as judgments docketted
according to the statute 4 & 5 W. & M. c. 20. statutes and
recognizances. 4. *Debt due by specialty*, as rent, upon bonds
or covenants. And 5thly, *Simple contract debts*, as on notes
unsealed and verbal promises.

Godfrey v. But though *rent is reserved by parol*, and the lease deter-
Newton. mined, yet it shall rank as a debt by specialty, and a bond
Ca.K.B.7. outstanding cannot be pleaded in bar to it, for the contract
Willett v. still remains in the reality.
Earle.

1 Vern.490. † 2. If the executor or administrator pays debts of an infe-
S. P. rior before those of a superior degree; he must answer those
† 2 Black. last out of his own estate. But in order to charge him on that
Comm.511. ground it must appear, that *he had notice of such debts of higher*
Corbet's *degree being then subsisting*. And that is only from the credi-
case.4 Leon. tor of such debt *bringing an action* against him for it, for that
60. only is legal notice.

Morrice v. And a *bill filed or a decree in the Court of Chancery* shall be
Bank of deemed of equal validity to attach a priority of demand or
England. operate as a notice, as an action at law.

3 P. Wms. * 3. "And notice is so necessary to charge the executor or
401. in not. administrator," That if an action is brought by a creditor
*P.292. on *simple contract*, and a judgement recovered; the executor
Davis v. may plead that judgment in bar to debt on a *bond*. For other-
Monk- wise an executor or administrator might be ruined by the ob-
house. Fitz- ligue keeping the bond without giving notice of it.
gib. 76. I Mod. 75. S. P.

But where to debt on a bond against an executor or admin-
Sawyer v. nistrator, he pleads a judgment confessed to an action on a sim-
Mercer. ple contract debt, he must further plead, "*That it was with-*
Pasf.27G.3. *out notice of the plaintiff's demand*." For in such case only is
1 Term. he excused, and otherwise he might defeat all the specialty
Rep. 696. creditors.

4th. "In debts of the same degree *priority of action* creates
Anon. "a priority of right to payment." That is, an executor or
Cro. Eliz. administrator shall not confess a judgment to a later brought
41. action in prejudice to a former: for he who first sues shall
be first paid.

"For the right attaches by *bringing the action* and not by
"the judgment."

Therefore where to debt on a bond against an executor he
Waters v. pleaded, assets confessed to a former action and *nil assets ultra*.
Ogden. Plaintiff demurred for cause, that *there was no judgment shewn*,
Doug1.436. and that it was not priority of *action*, but of *judgment*, that
attached

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attached the assets in the hands of the executor; but the plea was held to be good, for that *bringing the first action* created the preference, and that an * executor or administrator should *P.293. not be twice charged.

So if a man has an interlocutory judgment against an executor and dies, and his administrator sues out a *scire facias* on it, the executor cannot plead a judgment obtained against him in bar; for the judgment is absolute and defendant can only move to arrest it.

"And therefore the plea should shew that no payment was made after the action commenced by the plaintiff."

For if defendant in such case pleads so, and *sic plene administravit*, or this last only, the plea should conclude, "That he has no goods or chattels of the testator, nor had at the day of suing out the writ, nor ever since." For without such addition, as the plea refers to the time of its being pleaded, he might have paid debts between the time of the writ being sued out and the plea pleaded, which by law he should not have done.

Smith v. Harman. Salk. 315.

Hewlet v. Framingham. 3 Lev. 28.

5. As to the Order of the Debts in particular.

In strictness, no funeral expences are allowable against a creditor, except the coffin, ringing the bell, parson, clerk and bearer's fees, but not for pall or ornaments. The usual sum allowed is five pounds.

If the testator acknowledges a *statute or recognizance*, with condition to pay a lesser sum * at a future day; it will be a bar to debts of inferior degree, though the day of payment be not yet come, because it is a present duty, and is on record, on which execution may be taken out without further suit.

So though a bond has some time to run before it is due, yet it is a good bar to debt of an inferior degree.

And by the custom of London, simple contract debts due from one citizen to another, in case of intestacy, shall be paid in equal dedree with those due by specialty.

2. In what manner Payments under Administration are to be pleaded.

† 1. An executor or administrator should plead truly and honestly, and though there is a judgment for a penalty, he ought to plead the judgment and shew how much is really due.

2. If he pleads several judgments, and any one be ill pleaded or found fraudulent, the plaintiff shall have judgment. As if on such judgments pleaded, plaintiff was to reply *per fraudem*, and prove, that debtor was willing to take less than was recovered; this would be sufficient to prove the judgment fraudulent, unless the executor or administrator could shew that he had not assets even to pay that sum.

3. If an executor or administrator pleads six judgments, at nil assets ultra; it is a confession * of assets to above five, and Salk. 298.

Shelley's case. Salk. 296.

Buller N.P. 141. *P.294.

Lemure v. Fooke. 3 Lev. 16.

Buckland v. Brooke. Cro. Eliz. 315.

Snelling's case.

4 Co. 82. b. Cro. Eliz. 409. S. C.

† Parker v. Atfield. Salk. 311.

Ibid.

*P.295.

Ibid. Aston v. Sherman. and Salk. 298.

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and the *nil ultra* is not material or traversable, being but form.

Williams v. Fowler. And in such case defendant may reply the judgments generally *without shewing the consideration of them*; for if fraudulent, that should come out from the other side.

Philips v. So defendant may plead a statute entered into by his testator and then unpaid, without saying that it was for a just debt.

Newton v. If an executor pleads *plene administravit* to a *scire facias* on a judgment against the testator, it is bad; for the plea should shew "*how he had administered*". But this should be shewn for cause of special demurrer.

Littleton v. And Note, That it has been held that an executor is bound to take notice of a judgment obtained against his testator.

Hubbins. Cro. Eliz. 793. 4. If an executor pleads *non est factum* to debt on a bond, it is an admission of assets.

Ramsden v. Jackson. †5. If an executor confesses or suffers judgment to go by default, he admits assets in his hands and is estopped to say the contrary. And if another action is pending against him at the same time, during which the former judgment was obtained, and he neglects to plead that judgment and *nil assets ultra*, it is a confession of assets in the second action also.

And this is such an estoppel as to the jury, on a writ of inquiry, that if there are not goods * of testator's to answer the second judgment, the sheriff should return a *devastavit*.

*P.296. But a *cognovit actionem* is no admission of assets.

Bird v. Culmer. 3d. A third plea by an executor is that of

Hob. 178.

Ne unques Executor.

" Under this plea it comes in question not merely whether the person is actually executor, but whether administration has been properly committed to him or not."

Burston v. Ridley. 1. Where there are *bona notabilia* in several dioceses of the same province, there must be a prerogative administration. If there are *bona notabilia* in different dioceses of the different provinces of *York* and *Canterbury* there must be a prerogative administration in both.

Byron v. Byron. And bonds or specialties are *bona notabilia* where the securities are at the time of the death. But debts by simple contract follow the person of the debtor, and are goods in that death, where the debtor is at the time of the creditor's death.

2. If a diocesan bishop grants a probate of a will where there are *bona notabilia* in other dioceses, it is void. But if the deceased had *bona notabilia* only in one diocese, and a prerogative probate is taken out, it is not void, but voidable only. And in such case the diocesan * cannot grant a probate

*P.297. till the prerogative administration is repealed.

Re x v. Loggen & al. 1 Stra. 74. Vere v Jeffries. Quot. 3 Co. 30.

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3. If administration is granted to one *durante minore etate* of an administrator, it shall subsist till the administration attains the age of *twenty-one years*. For he is as a trustee, and no one is capable of acting as a trustee for another till he attains his full age. But if administration is granted to one *durante minore etate* of an executor, this shall cease when the executor attains the age of *seventeen years*, for he is appointed by the party himself, and may by the spiritual law be executor at the age of seventeen.

Freke v. Thomas. Salk. 39.

Pigot's Case. 5 Co. 29. a.

But in such case of an administration *durante minore etate* of an executor, in case of an executrix, if she is under seventeen years of age, and she marries a man of full age, the first administration shall cease, for the husband may administer as executor.

Prince's Case. 5 Co. 29. b.

All these cases therefore of administration granted irregularly, the defendant may take advantage of.

As to the plea itself it is to be observed,

1st. That if an executor pleads *plene administravit*, and thereupon issue is joined, that he has admitted himself to be executor, and therefore cannot shew that he only acted as agent for the executor; for then he should have pleaded *ne unques executor*. But if he gives in evidence a retainer, the plaintiff cannot object that he was executor *de son tort*, so could not *retain, without shewing the will, and who were rightful executors.

Arnold v. Arnold. Hill. 6 Geo. 2. per Eyre. Bull. N P. 143.

*P. 298.

2. Upon the plea of *ne unques executor*, may be given in evidence, that the seal of the ordinary was forged; or administration repealed; or that there were *bona notabilia*; but evidence that another person is executor; or that testator was non compos; or that the will was forged; cannot be given in evidence: For that would be to falsify the seal and proceedings of the ordinary, in a matter of which he has cognizance, and wherein he is judge: but in the former cases the seal of the ordinary is admitted and avoided.

Jane Noel v. Wills. 11. ev. 136. 1 Sid. 359. S. C.

3. If an action is brought against a person as executor, and he pleads, that he is not executor, but administrator, it must be pleaded in abatement, and not in bar; for a recovery against one as executor is a good bar to another action for the same cause against him as administrator.

Harding v. Salkill. Salk. 296.

And where defendant does so plead, that he is administrator, in abatement, he need not traverse, that he ever intermeddled as executor, which he might have done, and so have been executor *de son tort*. For it shall not be intended that he did so, as all acts are intended to be rightful, till the contrary appears. For if in fact the defendant was executor *de son tort*, plaintiff might reply it; and besides defendant need only traverse that which plaintiff has alledged in his declaration.

Fooler v. Cooke. Salk. 297. Powers v. Coote. Salk. 298.

*But if defendant is sued as administrator of J. S. and pleads, that he is executor, then defendant must go on and traverse, *absq.*

*P. 299. S. C.

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“ *Absq. hoc that J. S. died intestate ;*” and the reason is, that unless there was a dying intestate, no action can be brought against one as administrator, and to say that he was executor, is by implication only an answer to the dying intestate.

11. These are the pleas of the most importance which occur in this action ; and it will now be necessary to consider the cases of

E V I D E N C E.

1. *On the part of the Plaintiff.*

“ If there is in the declaration any averment which does not go to the gist of the action, nor is necessary to the support of it, (as on a collateral matter), such averment need not be proved.”

Hill v.
Hollister.
Pasch. 19.
G.2.K.B.
Bull. N. P.
167.

As where in debt on a policy of insurance, plaintiff, in his declaration, stated an agreement in the policy, that if any dispute arose, it should be referred to arbitrators chosen by either party, and averred, *that it had not been referred*, but without any default in him. At the trial, plaintiff did not prove *that he had ever named a referee* ; and it was therefore objected, that he had not proved his declaration. But on a case reserved, the Court were of opinion, that it was a collateral matter, and no part of the contract ; and so being not necessary to have been set out, need not be proved.

* P.300.

* 2. *In case of Bonds.*

Bull. N. P.
254.

Abbot v.
Plumb.
Dougl.205.

1. “ As the validity of a deed depends on the *delivery*, as well as the execution of it, both are necessary to be proved.”

It is therefore a general rule, “ *That the subscribing witness to a bond should, in an action on it, be always produced to prove the execution of it,*” unless some reason is shewn why he cannot be procured ; neither will the confession of the obligor himself to a third person be sufficient : but if the subscribing witness denies the deed, other witnesses may be called to prove the attestation.

“ But where the subscribing witness *cannot be had*, collateral evidence is good and admissible.”

Coghlan v.
Williamson.
Dougl. 89.

As where the subscribing witness was of the name of *Steele*, who not being produced, the plaintiff proved, that a person of that name had gone out to *India*, in a ship of which defendant was purser ; but enquiries had been made after him, and he could not be found. Plaintiff proved further, that he had applied to defendant to settle the bond, and that he then offered 80*l.* and to settle the rest with interest at the end of the year. This was held to be sufficient evidence to support the plaintiff's action, and he had judgment.

Where

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• Where the witness who attests a bond is dead, it is not ^{*P. 301.} sufficient to prove his hand, it must also be proved, *that he is* Henley v. dead. This case, though in equity, is there said to be the Philips. same at law. 2 Atk. 48.

So where the subscribing witness had become infamous, by Jones v. a conviction for forgery, on producing the record of the con- Mafon. viction, his hand was allowed to be proved by other witnesses 2 Stra. 833. as if he was dead.

“ In this last case the witness was incapacitated from being
“ a witness, by act of law, in which case collateral evidence
“ was admitted ; and the case is the same in matters of ne-
“ cessity, or where the witness is under any legal incapacity,
“ either by his own means or otherwise.”

As where the person who was *witness to the bond* was after- Godfrey v. ward *administrator de bonis non to the obligee*, and brought this Norris. action on it, and being plaintiff, was incapable of being an 1 Stra. 34. evidence ; proof of his hand-writing was held to be good evi- dence, and letters from the obligor admitted in evidence, which made mention of the bond.

So where there were three obligors in a bond, and one only Lockhart v. was sued, the other was admitted as an evidence to prove the Graham. execution of the bond by the defendant. 1 Stra. 35.

“ But the witness must prove the execution of the bond by
“ *defendant himself.*”

* For it is not sufficient to prove, *that one who called him- *P. 302.* self J. S. (the obligor in the bond) executed it, if the witness Memot v. did not know the defendant. Bates.
Hil. 4 G. 2.
Bull. N. P.
171.

2. In the case of Leases.

If defendant insists that the lease declared on is not the Per Holt at plaintiff's, the plaintiff may shew that it was made by one Maidstone. who had authority from him, to make it, (as his attorney), and 1 Ann. the authority need not be produced. Bull. N. P.
171.

But where a man gives power to an attorney, so to act for Coombes's him, the attorney cannot do it *in his own name*, nor as *his* Case. *own act*, but in the name and as the act of his principal ; and 9 C. 75. 2 Ref. Frontin v. if made otherwise it is void. Small.
1 Stra. 705.

3. In the case of Executors and Administrators.

If the defendant pleads *plene administravit*, the plaintiff can- Welburne v. not, upon this issue, give in evidence *a copy of the inventory* Dewsbury. delivered by the defendant to the spiritual court, *unless it* per Ch. J. *was signed by him*, though it was signed by the appraisers : 12 G. 1. Eyre. Hil. But he may give in evidence, *that the defendant had assets*, Bull. N. P. or if he gives an inventory in evidence, *he may shew that the* 140. *goods were undervalued.*

So, if in the inventory produced, and containing the ac- Smith v. Da- count of the debts due to the testator's estate, it does not dis- vis. Mich. tinguish Ch. J. 10 G. 2. per Hardwicke.

*P. 303. Bull.N.P. 140. Ayloff v. Ayloff. Hil. 2G. 2.C.B. Bull.N.P. 142. †Shelly's Case. Salk. 296. †Taylor v. Holman and Roberts. Sitings after Trin. 1769. Bull.N.P. 169. §Saunderson v. Nicholle. Show. 81. || S.C. *P. 304.

tinguish between * the *separate and desperate debts*, it will be sufficient to charge the executor with the *whole* as assets, and put him to prove if any of them were desperate. As if the article was, "*Item* for debts due and owing, which I admit myself to be chargeable with when recovered."

† But all the *separate* debts are assets in his hands ; for it is saying, that he may have them for demanding, unless the demand and refusal be proved.

‡ 2. Where the plaintiff has taken a judgment against an executor, who had pleaded *plene administravit*, of assets *quando acciderint*, he shall not, in a subsequent action against the executor suggesting a *devastavit*, be allowed to go into evidence of assets having been in defendant's hands before that judgment : for plaintiff, by so taking his judgment, had admitted that defendant had fully administered to that time.

§ 3. If defendant pleads *plene administravit*, to an action of debt, it admits the debt ; for it is as for a sum certain : but 'tis otherwise in *assumpsit*, which is for a sum uncertain, and in the form of *damages* ; for there the plaintiff must prove his debt.

|| And if the action of debt be on a bond, and *plene administravit* pleaded, and defendant offers proof of payment of another bond, he must prove that it was sealed and delivered, (that it was a complete deed intituled to * priority) ; but if it is on a simple contract, *payment is only necessary to be proved* : because, if no bond, it is a good administration in that action ; for the simple contract demands are in the same degree.

4. " As it was before observed, that by priority of action a right attached to the person who brought the action, by no artificial reference of the filing of the bill to the first day of term, shall the executor or administrator be injured."

Man v. Adams. 1 Sid. 432. For if to *plene administravit*, plaintiff replies assets at the time of exhibiting his bill, (viz. on the first day of term) if it appears in evidence, that the bill was not filed for some days after, defendant shall have advantage of it, and he shall not be bound by the laying of it on the first day of term ; but he shall be allowed all payments made before the real filing of the bill.

Bull.N.P. 144. But if to *plene administravit*, plaintiff replies, assets at the time of suing out his original, viz. on such a day, and defendant rejoins, that he had not assets then, on which issue is joined, the plaintiff need not give in evidence a copy of the original, to prove the time of its being taken out ; because the defendant admits it by his rejoinder.

*P. 305. Per Holt. Ch. J. Pasch. 4 Ann. Salk. MSS. Bull.N.P. 145. 5. If an executor compounds with the creditors, and after, at the suit of any of them, pleads *plene administravit*, proof of the composition would be conclusive of assets, nor * would the court suffer him to give evidence of no assets.

D E B T.

2. Of the Evidence on the part of the Defendant.

1. In debt on a bond defendant pleaded, that the money Titus v. was lent from 24th of August, to 24th May, for a premium of Lady Pres. 150 guineas ; on evidence, it appeared to be for nine months. 10n, 1Stra. It was objected, that there was a variance ; for the months 652. should be lunar months, and so that the contract would not reach to the 24th of May ; but it was adjudged, “ That the “ time should be governed by common understanding, which “ was kalendar months, and so that there was no variance.”

2. In debt for rent, and *nil debet* pleaded, defendant may Anon. give the *statute of limitations* in evidence ; for the statute is Salk. 278. in the present tense, and so makes it no debt at the time of pleading. But it is otherwise in *assumpsit*.

So, on the same issue, defendant may give entry and ex- 1Sid. 151. pulsion in evidence.

2. Upon *plene administravit* pleaded, and *issint riens inter* Co. Litt. mains, if it be proved that defendant had effects of the testa- 283. tor's in his hands, he may give in evidence, that he paid to that value of his own money, and need not plead it.

So he may, on this issue give in evidence, that he was but 1Mod. 174. executor durante minore etate ; * that he paid debts and lega- * P. 306. cies ; and that he had delivered over the residue of the testator's estate and effects to the infant, when he came of age ; for his power then ceases, and the new executor then becomes liable to actions ; but he will be answerable for so much as he has wasted, and the new executor has his remedy against him. It is said in this case, that he is not liable at other mens suits ; but in 6 Co. Packman's case, and Latch. 60. it is said he is ; of which last opinion Buller seems to be.

The decision in Packman's case is, that if an administration Packman's Case. be granted to one, which is afterwards repealed, and administration granted to another, that all dispositions and pay- 6 Co. 186. ments made by the first administrator, while his administration remains unrepealed, shall be good ; but if he wastes the goods, that any creditor may charge him in debt.

12. Having now at length considered the several cases on the grounds, pleadings, and evidence in this action, it now only remains to consider those on the heads of the

VERDICT AND JUDGMENT.

1. The jury, besides finding the debt, ought to give da- Per Wild mages for the detention, which is usually one shilling, though Just. Pasch. under particular circumstances it may be more ; as where 29 Car. 2. the principal and interest due on a bond exceed the penalty, Bull. N.P. in such case, the jury ought to give the residue in damages, p. 178. as well as in debt on a single bill.

And

***P. 307.** *And this is now settled, that the jury may so find, though contrary to the case of *White v. Sealy*, Dougl. 49. in which it is decided, that in debt on a bond, no more is recoverable than the penalty.

2. "Where this action is founded on a contract for a specific sum, and that grounded on the agreement itself, plaintiff can recover only that specific sum, and there can be no apportionment."

As where plaintiff declared in debt, on a promise to pay him 100*l.* per ann. for his trouble in collecting rents, and brought his action for 75*l.* for three quarters salary, and had a verdict for it in C. P. Judgment was reversed: for it was an entire contract for a year's service, and there could be no apportionment for a less time.

"But where the debt depends on something extrinsic (as rent, *ex. gr.*) there plaintiff may have a verdict for what is really due, tho' more is demanded."

"But as a sum certain is always claimed, the verdict must go to the whole of it, that is, if the jury find part to be due, they must find *nil debet* to the rest."

For where, in debt, on a charter-party, wherein defendant covenanted to pay fifty guineas per month, and plaintiff declared for 500*l.* due on balance on that account, defendant pleaded payment for all the time the ship was *in his service, and issue being joined thereon, the jury found that 357*l.* remained unpaid; but said nothing to the rest of the 500*l.* This was in C. P. and judgment was reversed; for the jury had not answered to the whole demand, and so the defendant might be called upon again.

3. If an executor pleads *plene administravit*, and issue is joined thereon, and the jury find that defendant had goods in his hands, but do not find the value, the verdict is void for uncertainty.

If the jury find *assets in Ireland*, it shall charge the executor; for such are assets every where, and the jury may enquire of them.

2. As to the judgment.

Courts of law formerly considered the *penalty* of the bond as the debt, and gave judgment accordingly. This drove defendants into Chancery, where the decree gave only what was really due for principal, interest, and costs. For remedy of this it was enacted, by stat. 45 Ann. c. 16. "That in all actions brought upon bonds, in which is a condition or defeasance to be void on payment of a lesser sum at a day certain, if defendant shall bring into Court all the principal, interest, and costs of such, the money so brought in shall be deemed a full discharge, and the court shall give judgment accordingly."

Under

D E B T.

*Under this statute it has been held,

*P. 309.

1. That where the bond is to pay a sum of money *by instalments*, upon failure of payment of any, and action brought on the bond, the defendant may, under the statute, bring the arrears, &c. of the last instalment into court. Bridges v. Williamson. 2 Stra. 814.

2. But where the bond is in that form, and default made in the payment of any of the instalments, the plaintiff may sign his judgment for the whole sum, but not take out execution till the instalments became due. Darby v. Wilkins. 2 Stra. 957.

So where the bond was for a sum of money payable at the end of three years, but the interest by half-yearly instalments. On default of payment of one half year's interest, the court allowed plaintiff to sign judgment for the whole sum, though not then due, but with stay of execution on payment of the interest then due. Masfen v. Touchet. 2 Black. Rep. 958.

3. "But in these cases the bond must be simply for the payment of money by instalments."

For where it was so reserved, but there was a further condition, "That if any of the instalments was unpaid, that then the bond should stand in full force for the principal and the interest then due." Default being made, the court refused to stay proceedings on payment of what was due for the instalments; * but gave judgment for the whole money then unpaid. Gowlett v. Hanforth. 2 Black. Rep. 958.

So where a bond was for payment of a sum of money, and the parties agreed, that it should be paid by instalments and a defeasance was executed, to be absolute if the payments were regular, if not to be void. Default being made in payment of one instalment, the court held the defeasance void, and that plaintiff might have judgment on the first bond for what was due. *P. 310.

2. The bail, in any action are only liable to the debt sworn to, and costs, not to the sum recovered by verdict, if more. Martin v. Moor. 2 Stra. 916.

3. If there is a judgment against two, and one of them dies, the plaintiff may have execution against the survivor. Edsar v. Smart. Sir Th. Raym. 26.

THE ACTION OF COVENANT.

COVENANT is an action brought for the recovery of damages for breach of any agreement entered into by deed between the parties.

F. N. B.
340.

Foster and
Wilson v.
Mapes.
Cro. Eliz.
212.

This agreement must always be by deed; but the action lies equally whether it be by *indenture* or *deed poll*.

So if the agreement is by indenture, it is sufficient to maintain the action against the covenantor, that *he* has sealed it and delivered it to the covenantee, though covenantee himself never sealed it.

1 Co. 80.

Covenants are either *in deed*, or *in law*.

Covenants in deed are such as are expressly mentioned and recited in the agreement between the parties.

Covenants in law are such as the law raises or implies, though not expressed; as if lessor *demises* to lessee by deed for a certain time, the law always implies a covenant on lessor's part, that the lessee *shall quietly enjoy during the term*.

*P.312.

Covenants again may be considered with reference to the object. As *real* or *personal*; that is annexed to the land, or merely to the *person*.

In treating of this action, I shall consider it, 1. With reference to the contract or agreement. 2. With reference to the person. 3. The pleadings. 4. The verdict and judgment.

1st, OF COVENANT WITH REFERENCE TO THE CONTRACT.

Under this I shall consider, 1. The creation of covenants. 2. The construction of covenants. 3. Covenants secured by bond. 4. What shall be a breach of covenant.

1st. *Of the Creation of Covenants.*

1 Roll. Abr.
518.

1. There is no need of the word *covenant*, nor of any particular form of words to constitute a covenant in deed; for any thing under the hand and seal of the parties *importing an agreement* shall support this action, as amounting to a covenant.

1 Roll. Abr.
519.

As in the case of a lease of lands, in which are the words "yielding and paying" so much *rent*. This is a covenant, and this action lies for the non-payment, for it is an agreement for the payment of rent, which amounts to a covenant.

1 Vent. 10.

*P.313.

So

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So where in a lease of mills were these words, "And Brett v. the lessee shall repair the mills," those were held to make a Cumberland covenant, for it was the clear agreement of the parties, and being by indenture, it is the words of both. Cro. Jac. 399.

So in indentures of apprenticeship, where there are no formal words, but only an agreement that the master shall do this and the apprentice that; yet it is a covenant on both sides. Prop. 136. Walker's case.

"But where the word *covenant* is wanting, "the words Roll. Abr. 519. "must import an agreement, or the action will not lie."

As if lessee for years covenants to repair, &c. provided Holder v. always, and it is agreed, "That lessor shall find timber." Taylor. This makes a covenant on the part of the lessor, and is a qualification of the covenant of the lessee. But if the words Roll. Abr. 518. had been only "that lessee would repair, provided always, that lessor should find timber," (without the words "it is agreed,") this would create no covenant on the part of lessor, but would be a condition precedent the performance of the lessee's covenant to repair.

2. "*Covenants in law* differ in this respect from covenants in deed, that the thing to be performed in the case of covenants in deed *is founded on the words, which express what is to be done, as yielding and paying, imply covenants to pay rent. But covenants in law do not follow the words, but are the implications of law raised from the express covenants, and required to be performed as necessary to the enjoyment of the express covenant." *P.314.

As in the case of leases for years by the words "*concessi & dimisi*." These words import a covenant in law on the part of the lessor that he has a good title, and therefore if Noke's case. 4 Co. 80. lessee is evicted, he may maintain an action of covenant. Carth. 98. For by reason of the defect of the lessor's title he could not enjoy the demise which had been made to him.

So where an assignment was by the word "*grant*" in case of eviction, covenant was held to lie. Andrew's Case.

3. "*A recital of an agreement* in the beginning of a deed shall create a covenant upon which this action will lie." Cro. Eliz. 214.

On the demise of a coal mine, it was recited, "That before the sealing of the indenture it had been agreed, that the plaintiff should have the third part dug, &c." On action of 3 Barfoot v. Picard. Kcb. 465. covenant brought on this, it was objected, that there was no covenant, that the plaintiff was to have the third part. But per Hales, were it but a recital, that before the indenture they were agreed, it is a covenant: so to say, "whereas it was agreed to pay 20l." For *now the indenture confirms the former agreement, by such declaration, and makes it a covenant. *P.315.

So where defendant by deed poll recited, that he was possessed of certain lands for years by good and lawful conveyance, and assigned the same with divers covenants and agreements, Severn v. Clark. 1 Leon. 122.

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ments, and gave bond for performance. It was resolved that the recital was to be held as within the condition of the bond, and that if he had not the interest recited, by good and lawful conveyance, that the bond was forfeited.

4th. "Where a covenant refers to a preceding instrument upon which it is founded, that instrument shall determine the covenant; that is, the covenant shall extend as far as the instrument, and no farther."

George v.
Butcher.
2 Vent. 140.

Defendant married *Rebecca Morse*, widow, who had issue by a former husband, *John, Samuel, Daniel*, and *Nathaniel*, to all of whom, *except Nathaniel*, their father had left by will 50*l.* Defendant, before the marriage took place, reciting the said will as it was, covenanted to pay the legacies devised by it, viz. 50*l.* to *John, Samuel, Daniel*, and *Nathaniel*. On covenant brought, defendant pleaded performance, viz. 50*l.* to *John, Samuel*, and *Daniel*; and plaintiff demurred for cause that he had not paid 50*l.* to *Nathaniel*, according to his covenant, but it was adjudged, that as the covenant was to pay the several legacies bequeathed by the will, that that should rule the extent of the covenant, and as no legacy was in the will *given to *Nathaniel*, he should recover nothing.

*P. 316.

5th. "But where a covenant is founded on a conveyance of an estate; if the estate intended to be conveyed is void, the covenant is void also."

Capenhurst
v. Capenhurst.
Sir T.
Raym. 27.

As where the conveyance was "a grant of so much of a term as should be unexpired at the death of *A.*" and covenant for quiet enjoyment and bond. This conveyance being void, on account of the uncertainty of the time, (*Co. Litt. 45. b.*) the covenants were adjudged to be void.

Northcote
v. Underhill.
Salk. 199.

But it is otherwise where the covenant is independent of the estate, as to pay money, &c.

2. Of the Construction of Covenants.

1st. Of covenants, in general. 2dly, Of special ones usual in conveyances.

1st. Of Covenants in general.

Per Lord
Mansfield.
in Shubrick
v. Salmond.
2 Burr. 1637.

"The distinction between the construction of covenants, implied by operation of law and express covenants is, that express covenants are taken more strictly; and a man may without consideration enter into an express covenant by hand and seal, to the performance of which he is at all events bound."

*P. 317.
Shubrick v.
Salmond.
2 Burr. 1637.

*As in this case, where a master of a ship, by charter-party covenanted to be at *Carolina* by a certain time, though it appeared that it was impossible that he could be there at the time,

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time, from storms and other causes; yet he was held to be liable on the covenant.

“ For where the covenant is exprefs, there must be an absolute performance, nor shall it be discharged by any collateral matter whatever.”

As where in covenant for a year's rent from *Michaelmas*, Monk v. 1725 to 1726, defendant shewed upon oyer of the lease, that Cooper. lessee by covenant was bound to repair in all cases, except 2 Stra. 763. fire, and then pleaded that before *Michaelmas*, 1725, the premises *had been burned down*, and not rebuilt by plaintiff during the whole year, *so that defendant had no enjoyment for the whole time claimed*. But on demurrer, the plaintiff had judgment; for the covenant to pay rent was absolute, and if defendant had any injury, he should have his remedy, but could not set it off against the demand for rent.

But note these exceptions.

1. If a man covenants to do a thing which then is lawful, Salk. 198. and a statute comes which declares it unlawful, or hinders him from doing it, the covenant is annulled by the statute.

2. If a man covenants not to do a thing which it was then lawful for him to do, and a statute comes which compels him to do it, the statute repeals the covenant.

*3. But if a man covenants not to do a thing which then *P. 318. was unlawful, and an act comes and makes it lawful; yet shall the covenant remain unrepealed.

2. “ Covenants are to be construed so as to have effect, and correspond with the intention of the parties at the time of making them; therefore a performance according to the letter, and not according to the spirit of the covenant, is not a legal performance.”

As where the condition of a bond was, that defendant Teat's case. should before a certain day deliver to the plaintiff a bond, Cro. Eliz. 7. wherein the plaintiff was bound to defendant. If before Robinson v. Aunts. that day defendant sues the plaintiff on the bond, and recovers, 1 Sid. 48. though at that day he delivers it up, yet it is no performance, S. C. for it could not be the intention of the parties, that it should be put in suit.

“ But if the covenant is once well performed, though by a subsequent act, it becomes of no effect, yet it is a sufficient performance.”

As if a man be bound that his son (who is then an infant) Leigh and shall before such a day levy a fine, or (being *infra annos* Hanmer's case. *nubiles*) shall marry B.'s daughter, before such a day and before such time the son levies the fine or marries the daughter, and the fine is afterward reversed for error, or the son when he comes of age disagrees to the marriage, yet is the covenant well and sufficiently performed. 1 Leon. 52.

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3. "But where there is any doubt as to the construction of a covenant, it is a rule, *that * it is to be taken in that sense which is most strong against the covenantor, and beneficial to the other party.*"

Hookes v. Swain.

1 Lev. 102.

1 Sid. 151.

Therefore, where defendant covenanted with the plaintiff, that if he would marry his daughter, that he would pay him *20l. per ann.* without saying for *how long*, it was held, that it should be for the *life of plaintiff* (the grantee) and not for one year only. For such construction is most beneficial to grantee, and against grantor.

"Therefore covenants being intended for the benefit of covenantees, by no act shall the covenantor be allowed to defeat the effect of his own covenant."

Griffith v.

Goodhand.

Sir T.

Rayn. 464.

Sir Th.

Jones. 191.

As where defendant covenanted, "That the plaintiff should have all the grains made in defendant's brewhouse for seven years," and the breach assigned was, that defendant *had put hops into the grains, by which they were spoiled*, and the cattle would not eat them. The action was held well to lie; for the intention of the parties was, that plaintiff should have the benefit of the grains, which by this means were useless.

So if I covenanted to leave all the timber which is growing on the land when I take it, and at the end of the term, *cut it down, but leave it there*, 'tis a breach of the covenant.

4. "No covenant shall be construed to a greater extent than the words import."

*P. 320.

* 1. In point of time.

Ld. Ailing-

ton v. Mer-

rick. 1

Saund. 411.

3 Keb. 45.

1. In covenant, plaintiff declared, on an indenture, in which it was recited, "That whereas Lord *Arlington* had appointed *T. Jenkins* to be his deputy postmaster for *six months* next ensuing, and the said *T. Jenkins* covenanted, that during the time he should continue postmaster, he would execute the office, and well and truly pay over such monies as he should receive," &c. &c. Defendant pleaded performance, and plaintiff replied, that the said *Jenkins* had continued deputy postmaster for *two years after*, and such a day in that time received so much and had not paid it over. *Per Cur.* no action of covenant will lie; the indenture limits the time to six months, which being expired, the continuance must be on a new agreement, not on the first indenture, and the time mentioned, "during which he should continue," refers only to the six months.

2dly, Nor to take in *more persons*, or *different* from those mentioned in the covenant.

Woodroff

v. Green-

wood.

Cro. Eliz.

517.

*P. 321.

City of

London

v. Greyme.

Cro. Jac.

182.

As where the covenant was that lessee should enjoy against all persons except the Queen, her heirs or successors, being kings or queens of *England*; this covenant was held not to extend to the *patentee* of the Queen.

3dly, "Nor to vary the duty to be performed."

For where the city of *London* covenanted, "To find eight men to grind every day in ** Bridewell* dock, and that if they failed in any part, that defendants should retain so much

per

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per man out of the rent," (the city being lessors of the house). Defendants pulled down the corn-mill, and erected an horse-mill, and then wanted to deduct so much as was the allowance for the eight men; but it was adjudged, that it could not be done, for *by the change of the subject*, the covenant was discharged.

So where, on a dissolution of partnership between plaintiff and defendant, who were wharfingers, there was a covenant, *Stephens v. Carrington. Dougl. 26.* "That plaintiff should have a moiety of the goods, and that each should bear an equal share of the expence of weighing and dividing; but that the plaintiff should solely bear the charges and expence of conveying his moiety of the goods to a warehouse he had taken." The breach assigned was, "That defendant *had not delivered* the moiety of the goods," and on demurrer the defendant had judgment; for there was no part of the covenant *to deliver*, and therefore no action lay on it; though it had been otherwise if defendant *had obstructed* plaintiff in removing the goods.

4th. "The operation of a covenant must therefore be confined to that only which is in being at the time of the covenant."

As where in a lease made by the bishop, was that covenant usual in bishops' leases, "to pay all taxes;" this shall not be construed to extend to any taxes, *but such as were in being and use before*, that is synodals, procurations, tenths, and subsidies, and not to any charges or taxes *after imposed*, or of *another nature*. *Davenant v. Bishop of Sarum. 2 Lev. 68. 1 Vent. 223. *P. 322.*

5th, Express covenants shall qualify the generality and extent of covenants in law. *Noke's Case. 4 Co. 80. 4 Ref.*

6th, Where the covenant is for any thing which is either contrary to law, or such as is contrary to good policy to support; this action cannot be maintained.

Of this description are covenants in restraint of marriage, or in restraint of trade. *Vid. chap. 2.* *Lowe v. Peers. 4 Burr. 2225.*

4. "I now proceed to the construction of particular covenants usual in conveyances."

The 1st are covenants for

Quiet Enjoyment.

Where there is a covenant for quiet enjoyment, this shall not extend to a *tortious ejection by a stranger*; because that for this wrong lessee may have his remedy against the stranger himself: but if the lessee be ejected by lessor himself, there lessee may have covenant. *Tisdale v. Sir William Essex. Hob. 35. Cro. Eliz. 213.*

* But if the stranger claims by *elder title* than the lessor, lessee may have covenant against lessor, for he then can have no redress against the stranger, whose title is good in law. **P. 323. F. N. B. 342.*

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2. But

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Tisdale v. Effex. Hob. 35. 2. But if lessor covenants expressly that lessee shall enjoy during the term, "quietly, peaceably, and without interruption," this will extend as a covenant *against all tortious ejectments whatever.*

Perry v. Edwards. 1 Stra. 400. And though the general covenant to save harmless, or for quiet enjoyment, does not extend to the tortious acts of a stranger; yet lessor may covenant against *the acts of a particular person or persons*, in which case covenant will lie, in case of a tortious ejectment by them.

Whichcott and al. v. Nine. 1 Brownl. 81. 3d. "The breach of this covenant must be *by some act.*" For there the covenant was for quiet enjoyment, without let, trouble, or interruption; and the breach assigned was, that lessee having under-let, *lessor had forbid the tenant to pay his rent.* It was held to be no breach; for there was no act causing a breach.

Gervis v. Peade. Cro. Eliz. 615. *P. 324. So where a tenant for life made a lease for twenty-one years, by indenture, and covenanted, "That he had not done any act to prejudice the said lease; but that lessee should enjoy it against all persons." Tenant for life died, and his lessor entered, on which lessee *brought covenant against the executor of tenant for life: And it was adjudged, That it lay not; for the last words, *that lessee shall enjoy it against all persons*, refers to the first words, *for any act done by him*, and so the covenant was not broken.

Seaman v. Browning. 1 Leon. 157. And an act of a servant who enters by command of his master, shall be a sufficient breach within this covenant.

Loyd v. Tomkins. Pasch. 27 G. 3. B.R. Term. Rep. 671. 4th, But where the covenant is for quiet enjoyment, against *the lawful let, suit, entry, or eviction of covenantor himself, his heirs and assigns*, a disturbance by him, if done under a claim of right, is a breach of covenant: As here where it was by locking up two pews in a church, which had been parcel of the demise on which the covenant was made. Neither in this case need the declaration express the disturbance to be under a claim of right, it clearly appearing to be so.

5th, "This covenant for quiet enjoyment is usually from any acts of lessor, or any claiming under him. Those who claim under him are those *who come in in privity of title*, as heir, executor, assignee."

But there are others to whom this covenant extends.

Hurd v. Fletcher. Dougl. 43. *P. 325. As in this case where *feme covert* seized in fee, she and her husband levied a fine to the use of the husband for life, with power to *make leases, remainder to trustees to secure the wife's jointure, remainder over, with power of revocation, and to declare new uses. They did revoke and declare new uses, taking away the husband's estate for life, and leasing power, and limiting them to wife for life, and after several intermediate remainders, to Lord Tankerville

in

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in tail. After this new declaration of uses, the husband made the lease in question with the covenant for quiet enjoyment against him, and *all claiming under him*. Lord Tankerville having evicted lessee, covenant was adjudged to lie against the executors of the husband; for tho' the estate moved from the wife, yet *the husband's assent being necessary to the declaring of the new uses*, Lord Tankerville was a person *claiming under him*, and so within the covenant.

2. "A covenant to *save harmless* is similar in its nature to that for quiet enjoyment, and the law as to it is the "same."

Therefore this covenant is not broken *by the tortious act* of any one not claiming under the lessor. Perry v. Edwards. 1 Stra. 400.

For where lessee of a term rendering rent, assigned it to J. S. and J. S. covenanted to save lessee harmless of all rents payable to lessor, and afterwards J. S. let part of the land to the first lessee, and *his hay was there distrained for rent-arrear*; this was held to be no breach of the covenant; for the distress * of the hay was unlawful, and a trespass; and the sufferance of the rent to be in arrear, was no breach of the covenant, without actual damage. Cowper v. Pollard. 1 Roll. Abr. 433. *P. 326.

3. The next covenant I shall consider is,

That lessee shall not alien or assign.

1. Where the covenant was to that effect, "That lessee should not assign, transfer, or set over the said premises, or any part thereof," and lessee *made a lease for part of the time*: It was adjudged, that such *under-lease* was no assigning, transferring, &c. and so was no breach of the covenant. Crufoe ex dim. Blencowe v. Busby. 3 Wils. 234.

2. So where lessee made a lease of his whole term, *but reserved the rent to himself*; it was held to be no assignment. Pultney v. Holmes. 1 Stra. 405.

3. So where the covenant was, "That lessee should not assign over his term without lessor's consent first had in writing, and lessee *devised* the term without any such consent obtained;" this was held to be not such an assignment as was a breach of covenant. Fox v. Swan. Style 483.

But where the covenant in a lease was, "That lessee, his executors, administrators, or assigns, should not set, let, or assign over the whole premises demised, or any part of them, without *leave in writing* first had and * obtained," under penalty of forfeiting the term, and lessee's administratrix did under-let for part of the time; it was held to be a forfeiture, and that leave *by parole* was not sufficient. Roe ex dim. Gregson v. Harrison. Pasch. 28 G. 3. 2 Term. Rep. 425. *P. 327.

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Collings v. Silly. Style 265. 4. So where the covenant was not to assign the whole, or any part of the lands demised, without lessor's consent, and lessor entered into part himself, and then lessee assigned; this was held to be a breach of the covenant, notwithstanding lessor's entry.

Cro. Eliz. 757. 5. If lessee is bound not to alien without licence, if that licence is obtained, and assignment takes place, yet *the assignee is still bound by the covenant, and cannot alien*, without licence again obtained.

4 The next most usual covenant is
That for repairs, and to deliver up in good plight as lessee received the premises.

Fitzh. Abr. title, Covenant, fol. 4. If lessee covenants to keep an house in repair, and leave it in as good plight as it was at the time of making the lease; in this case the *ordinary and natural decay* is no breach of covenant; but the lessee is bound to do his best to keep it in the same plight, and so should keep it covered.

F. N. B. 342. And where there is this covenant on the part of lessee, if *he pulls down houses, or suffers them to decay*, no action will lie against him, till the end of term; for before that time *he may repair them*: but if he *cuts down timber or * trees*, covenant lies immediately, *for such cannot be replaced in the same plight*, at the end of the term.

*P. 328. 2. "A general covenant to repair, and to deliver up in repair, shall extend to whatever erections or buildings shall be raised during the term."

Douse v. Earle. 3 Lev. 264. 2 Vent. 126. S. C. On a demise of three messuages for forty-one years, lessee covenanted "to build *three houses*, in the room of those which were then standing, to maintain the houses so to be erected, and to deliver them up in sufficient repair." Lessee erected *five houses*, and at the end of the term *left one of them out of repair*, covenant was adjudged to lie; for the covenant to leave in repair should extend to all.

Beale v. Taylor. 1 Leon. 237. 1 Ld. Raym. 420. 3. It has been held, that if the lessor covenants to repair during the term; if lessor will not do it, lessee may repair and pay himself by way of retainer: But *Holt, C. J.* doubted of this, unless there was a covenant to deduct.

Prettyman v. Thoras. quot. 1 Sid. 423. 4. If the covenant is, "It is agreed that lessee shall keep the house demised in good repair, *the lessor putting it into good repair*," covenant lies against the lessor, on these words, if he does not put it into good repair.

5. The next covenant I shall consider is that

*P. 329.

* *For further Assurance.*

Rosewell's Case. 5 Co. 19. 1. If the covenant is, "That the party shall make such further assurance to the lessee or purchaser, as his counsel shall devise," in this case the *lessee or purchaser himself cannot devise the assurance*;

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surance; for then it would be no plea to say, *quod consilium non dedit advisamentum*; but the *counsel* should devise it.

And where the covenant is the same as the last case, *the Higginbo-counsel should not give the advice or notice of the assurance* he *tham's* case. had devised, immediately to the *lessor or bargainer*; but he 5 Co. 19. should give it to his client the *lessee or bargainee*, who should communicate it to the party who was to make it.

2. If *A.* covenant with *B.* to make such assurance as *B's* Bennet's counsel should advise; 1st, *B.* must give notice of the assurance. *Cro.* *ance*, otherwise *A.* could not know how to make it; 2^{dly}, *B.* *Eliz.* 9. is to give the assurance to *A.* for his perusal, and to take advice on it, and *A.* is to have convenient time to perfect it.

3. If the covenant be to make further assurance at all Pierpoint times, at the charge of the covenantee, covenantor shall v. Thimbleby. 1 Roll. Abr. have a reasonable time to do it, after having notice of what is intended. 441.

6. Another covenant is

* *Not to Plough Meadow.*

*P. 330.

On which has been this decision,

That this covenant shall only extend to what was *really* Skipwith meadow at the time of the demise; and if the land is described in the lease under the title of meadow, which in fact is *1 Stra. 610.* then arable, the tenant shall not be estopped by the words of the lease, to prove it not to have been meadow.

3^{dly}, I shall now consider the law as to

Covenants secured by Penalty or Bond for Performance.

1. "There is a difference between covenants in general, Per Lord and covenants secured by a penalty of forfeiture. In the Mansfield latter the obligee has his election to bring an action of debt for the penalty, after a recovery of which he cannot ^{Peers.} again resort to the covenant; because the penalty is a ^{4 Burr.} satisfaction for the whole: or he may wave the penalty, ^{2225.} and proceed on the covenant, and recover more or less than the penalty *toties quoties*."

Another distinction is, where the penalty is only in nature punishment, or *in terrorem*, and where it makes part of the agreement as a compensation.

* As if the covenant be "not to plough meadow," and *P. 331. there be a penalty of 50*l.* an acre, there a court of equity ^{4 Burr.} will relieve; for there the penalty is as a punishment: but ^{2228.} the covenant had been "to pay 5*l.* for every acre of meadow

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meadow ploughed," this is part of the agreement, and there is no alternative, it is the particular liquidated sum agreed upon by the parties, and is the proper *quantum* of the damages which the jury ought to find.

Lowe v.
Peers.
Ibid.

And therefore where the covenant was by defendant, not to marry any one except the plaintiff; and if he did, that he would pay her 1000*l.* this sum, it was held, should be the settled *quantum* of the damages to be found by the jury.

Brigstock
v. Stan-
nion. 1 Ld.
Raym. 107.

2. A difference is also to be observed between assigning a breach on an action of covenant, and in debt, on a bond for the performance of covenants: That in covenant it is sufficient to assign the breach *in the words of the covenant*; because all is recoverable in damages, and *these* shall be what plaintiff can prove he has sustained; but in debt on the bond a *certain breach* must be assigned.

Co. Litt.
282. a.

Though if the *substance of the breach* so assigned is proved, it is sufficient, though not precisely as laid: As bond by lessee not to cut trees, and breach assigned in cutting *twenty trees*, proof of the cutting of *ten* will support the

*P. 332.

* action; for the cutting of the trees is the substance.

3. At common law, if debt was brought on a bond for performance of covenants, the plaintiff could assign but a single breach. But if the action was covenant, he might assign as many as he pleased.

But it is now enacted by statute 8 & 9 Will. 3. c. 10. "That in debt on a bond or penal sum, for performance of covenants, plaintiff may assign as many breaches as he pleases, and the jury shall assess damages for such as have been broken; And in case of judgment on demurrer, or by *nil dicit*, the plaintiff may suggest upon the roll as many breaches as he shall think fit, upon which a writ of inquiry shall go: But defendant may pay all damages and costs, &c. and then there shall be a stay of execution; but the judgment shall still remain as a further security to answer the plaintiff such damages as may be sustained for further breach of any covenant in the same indenture, upon which plaintiff may have a *scire facias toties quod ties*."

The reason for enacting this statute was this: That at common law the party might bring debt, and recover the whole penalty, which, as it often exceeded the real damage, the other party was driven to equity for that relief which this statute gives.

*P. 333:

Drage v.
Brand.

*Wilf. 377.

* These decisions on the statute have therefore taken place

1. If debt is brought for the penalty, and *issue joined on nil debet*, the jury should not give a verdict for the whole

but *assess damages for each breach assigned*; and therefore

where

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where, in this case, plaintiff took a verdict for the whole penalty, a *venire facias de novo* was awarded.

2. But where there is judgment *on demurrer* (or *nil dicit*) Goodwin there the plaintiff must have judgment for the whole penalty; v. Crowle. but he cannot take out execution for the whole, but must sue Cowp. 357. out a *writ of inquiry*: But the judgment still remains as a security for further breaches.

And note, 1. That if a bond is for performance of covenants, that it is forfeited by a breach of a covenant in law, as if lessee is evicted out of the premises demised. Nokes's Case. 4 Co. 80. 2 Ref.

2. If a man covenants to enter into a bond to lessee for the enjoyment of certain lands demised, and does not express what the sum shall be, he shall be bound in such a sum as is equal to the value of the land. In Samon's Case. 3 Co. 78. a.

4th, It now remains to be considered,

What shall be a Breach of Covenant.

Under this head I shall first consider at what time a breach of covenant may be committed; and 2dly, in what manner.

* 1. As to the time.

* P. 334.

"Covenants considered with respect to the Time of Performance are of three Kinds."

1. Such as are mutual and independent, "where either party may recover damages from the other for the injury he may have received from a breach of the covenants in his favour, and where it is no excuse for the defendant to alledge a breach of the covenants on the part of the plaintiff." Dougl. 665.

As here where plaintiff declared, on a covenant between his testator and defendant, "That testator should assign to defendant an house, and that defendant should pay 30l." And the breach assigned was, "That defendant had not paid the 30l." He pleaded, That testator had not assigned; and on demurrer it was held, that these covenants were mutual and independent, and the parties might have reciprocal actions: so that plaintiff's action lay before the assignment. French v. Trewin. 1 Ld. Raym. 124.

Of this first species of mutual covenants, and which best shews their nature, are those where there is a negative covenant on one part, and an affirmative on the other, in consideration of the performance of the negative. 2 Saund. 155.

As where there was a negative covenant not to follow a trade, and in consideration of that plaintiff promised to pay him 100l. per ann. * during his life, this is an independent covenant, and does not depend on the performance of the other: for defendant never can be said to perform his covenant, for a negative covenant never can be said to be performed; Humlock v. Blacklow. 2 Saund. 155. Cole v. Shallett. 3 Lev. 41. S. P.

* P. 335.

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formed; so that plaintiff would be without remedy for his 100*l. per ann.* if there were not mutual and independent remedies.

Dougl.
665.

2. " The second species of covenants considered with reference to the time of performance are, such as are conditions, and *dependent*, in which the performance of one depends on the prior performance of the other; and therefore till the prior condition is performed, the other party is not liable to an action of covenant.

" The principal doubt under this head is, what constitutes a prior condition, and these resolutions following have taken place."

Blackwell
v. Nash.

1 Stra. 535.

1. Plaintiff declared, that he covenanted to transfer to defendant, on or before the 21st of September, so much stock, and that defendant *consideratione præmissorum*, covenanted to accept and pay for it; and breach assigned, that he was ready to transfer, and that defendant then and there refused to accept or pay for it. On demurrer, it was objected, that the transfer was a condition precedent, and that plaintiff should therefore shew an actual transfer before he brought his action; but it was held, that in *consideratione præmissorum* is, in * consideration of the covenant to transfer, not of the actual transfer: That it was therefore not a condition precedent, but that a tender was sufficient to support the action.

* P. 336.

Thorpe v.
Thorpe.
Salk. 171.

2. In executory contracts, if the agreement be, that one shall do an act, and for the doing thereof that the other shall pay, there the doing the act is a condition-precedent, and the party who is to pay shall not be compelled to part with his money till the thing be performed for which he is to pay.

But there are exceptions,

As if the day appointed for payment is before the time when the thing can be performed, an action may be brought for the money before the thing be done; for it appears, that the party relied upon his remedy, and intended not to make performance a condition-precedent; But *aliter* where the day is subsequent to the performance.

Puter v.
Carter.
1 Roll.
Ab. 438.

Per Lord
Mansfield.
Dougl.
665.

* P. 337.

3. But where prior performance is necessary, that performance by one party immediately raises a duty on the part of the other, and he is bound to perform his part within convenient time, and without request.

4. The dependence therefore or independence of covenants is always to be collected from the evident sense and meaning of the parties, and however transposed the words may * be, their precedency must depend on the order of time in which the intent of the parties requires their performance.

As

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As where plaintiff declared, that defendant covenanted at Kingston the end of a year and a half, "That he would resign his business of a mercer in favour of plaintiff and another, who should execute deeds of partnership, and *that immediately after the execution of such deeds, he would permit the plaintiff and another to carry on said business*, and that he (the plaintiff) covenanted that at and before the sealing of the said deeds, that *he would procure good and sufficient security* to be given to defendant to secure to him 250*l.* per month, until the stock should be reduced to 4000*l.*" and assigned a breach, that he was always ready to perform his part, but that plaintiff had not resigned, and refused to surrender up the said business. Defendant pleaded that plaintiff had not given nor tendered such sufficient security for payment of the 250*l.* On demurrer defendant had judgment; for the essence of the agreement was, that defendant should not trust to the personal security of the plaintiff, when he delivered up to him his stock and business, and therefore the finding security was a *condition precedent*, and performance should have been averred.

3d. "The third species of covenants, considered with regard to the time of performance, are such as are mutual conditions, and to be performed at the same time. * In these if one party is ready, and offers to perform his part, and the other neglects or refuses to perform his, he who is ready and offers, has fulfilled his engagements, and may maintain this action for default of the other, though it is not certain that either is obliged to do the first act."

As where plaintiff declared on an agreement by defendant to pay 600*l.* on plaintiff's assigning an equity of redemption in certain premises, &c. It was adjudged that the word on makes it a covenant to be performed at the same time by each party, and that therefore where plaintiff offered, and was ready to perform his part, and defendant refused to perform his, that plaintiff should maintain his action for the non-performance.

2. "But where plaintiff relies on a tender and refusal, it should appear that he *could have performed* his part when the tender was made."

For where the issue was on tender of stock at a certain day, it was proved that though the books were not open for transfer of stock that day in common form, yet that by leave of a director (which not usually denied) a transfer might be made, but that defendant never attended. It was resolved, that plaintiff had not performed his part, so as to entitle him to the action, for perhaps leave might not have been obtained, and so he could not perform his part.

* 3. "Therefore if one party disables himself from performing his part by any act of his own, the other party

" is

Kingston v. Preston.
Pasch. 13
Geo. 3.
B. R. quot.
Dougl.
664.

Defendant

Dougl.
665.
* In 1 Lev. 295.
* P. 338.

Jones v. Barkley.
Dougl.
659.

Clark v. Tyson.
Stra. 504.

* P. 339.

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" is not obliged to offer to perform his part, but may have his action immediately."

Maynie v. Scott. As where lessor covenanted with lessee to make him a new lease on surrender of the old within twenty years, and before the twenty years expired, lessor aliened the land to another by fine, it was adjudged that the action lay immediately, for that he had disabled himself to accept a surrender, and so to make a new lease.

2. I shall now consider in what manner a breach of covenant may be committed.

1. " If the covenant is a *covenant indeed*. This action will lie only for a *misfeasance*, but not for a *nonfeasance*. As if a man grants a way, covenant lies for stopping it up, but not for letting it out of repair.

" For covenants in deed must be broken by *some act* done."

Lord Rich v. Lady Rich. Cro. Eliz. 43. As where in marriage articles husband covenanted that the lands assured to the wife for her dower were of the yearly value of 1000*l.* and should so continue notwithstanding any act done or to be done by him, and the breach assigned was that the lands were not of the yearly value of 1000*l.* It was adjudged, that covenant would not lie, for there was no act causing a breach.

*P. 340. " So where a parson let his rectory for three years, and covenanted with lessee, that he should have and enjoy it for the term, without any expulsion, or any act to be done by lessor. The parson was afterwards deprived for not reading the articles under Stat. 13 Eliz. and his successor having ousted lessee, he brought an action on the covenant, and it was held not to lie, for this was no act of the lessor, but merely a *nonfeasance*, and so not within the covenant. In like manner as if a man covenants not to do waste, permissive waste is out of the covenant.

2. " But in the case of a covenant *in law*, action lies on it, though there has been *no act* to cause a breach."

Holder v. Taylor. Hob. 12. As where defendant was lessee by the word *demise*, and covenant was brought by lessee; because that lessor was not seised, but a stranger, and the action was held well to lie on the covenant in law, though *lessee had never entered*, and no actual expulsion had taken place; for it would not be reasonable to force lessee to enter and become by such entry, a trespasser.

3. " Breach of covenant must always refer to that which is the *subject matter of the covenant or undertaking*."

*P. 341. " As where there was a covenant in the lease of a manor for years, that if lessee *disturbed*, or put out any of the copyholders paying their duties and services, that the lease should be forfeited, &c.; and breach assigned, that * lessee entered upon a copyholder in a cow-house, parcel of the premises, and *beat him*, and for that disturbance this action

Penn v.

Glover.

Cro. Eliz.

420.

Dobron v.

Crew.

Cro. Eliz.

705. S. P.

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action was brought. On demurrer, it was adjudged, that the covenant only applied to disturbance *by ouster of the lands* of the copyholder, not to personal injuries, and so that the covenant was not broken.

So where in covenant for quiet enjoyment by defendant to Morgan v. the plaintiff, the breach assigned was, "That defendant Hunt. 2 *had exhibited a bill in Chancery against him, for ploughing Vent. 213. meadow, and obtained an injunction*, which had been dissolved, with 20*l.* costs." On demurrer, this was held to be no breach of covenant; for it was for quiet enjoyment, and this was a suit for *waste*.

4. "Breach of covenant must always be committed on *that which is granted by and passes under the deed containing the covenant.*"

For where plaintiff demised to defendant certain premises, *excepting one close*, and breach was assigned, an entry *into this close*, the action was held not to lie; for though the exception was an agreement that the close should not pass, yet it was no agreement on the part of the lessee, *that he should not occupy nor enter on it*, and therefore his entry was no breach: The only case in which an exception shall be an agreement to charge lessee is, when he agrees to let lessor have a thing *dehors* * which he had not before, as a **P.342.*

5. "To support this action, the *breach* must be committed *during the existence of the estate*, on which the covenant is placed; for if the estate expires *at the time* the covenant is broken, this action cannot be maintained."

As where tenant for life leased for years: Lessee by indenture, bargained and sold all his estate, to have and to hold in as ample a manner as he held it: Tenant for life died before all the years were expired, and bargainee brought his action against bargainor for the eviction before the end of the term; and it was held not to lie: For by the death of tenant for life, the lease expired, and the covenant founded on it.

"But if *the estate continues after the breach* committed, the action will lie even after the estate expires."

As where the covenant was, that lessee should enjoy the premises discharged of tithes, but that if lessee was sued for them, and a recovery had, that he should retain so much out of the rent: After the term, lessee was sued for two years tithes owing while he was in possession, and a recovery had against him. He was allowed to recover to that amount in covenant against the lessor.

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*P.343. * OF COVENANTS WHICH RESPECT THE PERSON.

These are, 1. Such as are joint and several. 2. Such as respect assignees. 3. Heirs and executors. 4. Baron and feme. 5. Tenants in common.

Of Joint and Several Covenants.

Slingsby's
Case.
5 Co. 19. b.

1. Where a covenant is made to many and jointly as "with and to them together, and *quolibet eorum*;" yet shall its construction be determined by the *interest* which it passes: That is, if each of the covenantees hath, or is to have, a *several interest or estate*, there, though the words be joint, each shall have a separate interest under the words "*cum quolibet eorum*:" But where the interests are not several, these words shall not make the estate several, which by the former words was created joint.

Ibid.
Mathew-
son's Case.
ante 285.

"And the action is to be brought therefore, jointly or severally, according to the interest which it passes."

2. "So joint covenants shall be taken distributively for the benefit of the estate."

Meriton's
Case. Noy
86.

As where two made a lease and covenanted, "That the lessee should enjoy the land without let from *them* or any other person," and *one alone* disturbed the lessee; it was *adjudged to be a breach of covenant, and that this action lay against the disturber, though the words of the covenant were not several.

*P.344.

3. "Where the covenant is a *covenant in law*, it shall be taken to be joint, if the interest is so, and the action must be brought against the covenantors, jointly, *for a breach at the time of the making of it*. But for a *subsequent breach* it may be sued severally."

Coleman v.
Sherwin.
Salk. 137.

Plaintiff declared, on a demise by defendant and one J. S. *virtute cuius* he entered and was possessed, till ejected by the defendant, and that neither the defendant nor J. S. ought to have demised, for that one R. was seised in *fee*. It was resolved, That there being no express covenant, the action was founded on the covenant in law, on the word "*Demiserunt*;" and as the interest granted by the word was joint, so was the covenant, and the action should have been brought against both lessors, *for that breach*, and would not lie against defendant alone. 2. But as to the breach by the *eviction*, it was well assigned; for *it is the act of one only*, and in construction of law each did demise, and it was a several contract as to their subsequent acts.

†East Skid-
more & al.
v. Vaudstee-
van.
Cro. Eliz.
50. 2 Roll.
Abr. 22.

†4. If a deed indented is made between two parties, and a third person is afterwards named in the deed, and comprised in the covenant, and such third person seals the deed, yet no action

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action will lie for or against him on the indenture, and a release from him shall be void, for he is no party to the deed. But if the deed * was a *deed-poll* as to *omnibus Christi fideles*, *P. 345. *bus, &c.* there a covenant may be made to divers persons.

5. Where a *covenant is joint and several*, an action may be brought against one, and breach assigned in the neglect of both: as in covenant by two, to receive the plaintiff's rents; and to account, and breach assigned the not accounting, *they nor either of them*, for perhaps one never sealed the deed, and one man often covenants for the act of another.

6. *Tenants in common* should join in this action.

7. If several covenant jointly and severally, a *defeasance to one is a defeasance to all*: But covenantee may covenant with one *not to sue him*, and yet sue the others; for though in such case a *release* to one would be a release to all (*Co. Lit.* 232.) and a covenant not to sue is to avoid circuity of action, construed a release, yet it is not so in its nature; and therefore where he has a remedy left against the rest, it shall be construed a covenant, and no more.

But two deeds made at the same time, between the same parties, *that have not a reference one to the other*, shall not be construed a defeasance one of the other.

And note, That in the case of leases for years, the defeasance may be after the first *deed. But 'tis otherwise in the case of freeholds of corporeal inheritances.

2. Of Covenants which respect Assignees.

1st, These are either *against* assignees; or 2dly, By them.

1. Of Covenants against Assignees.

1. When the covenant relates to, and is to operate on a *thing in being, parcel of the demise*, the thing to be done by force of the covenant is *quodammodo* annexed to the thing demised, and shall go with the land, and bind the assignee to the performance, though not named. As if the covenant to repair an house *then demised*, this shall bind the assignee, tho' not named. But 'tis otherwise where the covenant relates to a thing *not in being* at the time of the demise. As if to be *to build a wall* on the land demised, this not being in being when the covenant was made, it shall not extend to the assignee, if not named.

2. But if the covenant mentions the assignee; as if lessee covenants for him and *his assigns*, there the assignee shall be bound, by any covenant, *for any thing to be done on the thing demised*; as here to build a wall on the lands demised: But do any thing which is * *merely collateral to the thing demised*, *P. 347.

Litt. 315.

Clayton v.

Kinaston.

Caf. K.B.

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mised, as to build an house on some other part of the lessor's land, there assignee shall not be bound, though he is named.

3. "Wherever a covenant *is for the benefit of the estate* demised, this shall extend to the assignee, though not named."

Cookson v.
Cook.
Cro. Jac.
125.

As in this case, where lessee covenanted for himself, his executors and administrators, "to leave fifteen acres every year, untill'd," and afterward assigned his estate to the defendant, and the breach assigned was "That defendant had not left the fifteen acres untill'd, but on such a day had ploughed part," &c. And exception being taken that the assignee not being named was not liable; it was adjudged, that the covenant *being for the benefit of the estate*, that he was liable.

4. "So a covenant which extends to *the support* of the thing demised, shall bind the assignee, though not named."

Dean and
Chapter of
Windfor's
case.

As a covenant to *repair the houses, &c. demised*, for such is for its support, or, according to *Spencer's case*, ante 346. extends to it as in *esse* at the time of the demise.

5 Co. 24.

5. "Though the assignee be named in the original cove-

Grescot v.
Green.

nant; yet if it has been broken before assignment, no ac-

Salk. 199.

tion will lie against him."

*P. 348.

*† As where lessee covenanted to pull down certain old

†Church-

houses, and rebuild others within seven years, lessee did not

wardens of

perform his covenant, and at the end of seven years assigned

St. Saviour's

to defendant, against whom the action was brought, and

Southwark

held not to lie, *the breach being complete before the assign-*

v Smith.

ment.

1 Black. Rep.

6. "To intitle the lessor to maintain an action of cove-

351.

nant against a lessee, *as assignee*, he must be assignee of *the*

3 Burr. 1271.

"*whole term.*"

S. C.

Holford v.

For where the original lessee *made an underlease for a time,*

Hatch.

somewhat less than the term of his lease, and lessor brought

Dougl. 174.

covenant against the under lessee; it was adjudged not to

lie, he not being *assignee*, and plaintiff having declared against

him in that capacity. *Vid. ante 220.*

Tilney v.

7. If there is a covenant which runs with the land, as to

Norris.

repair *ex. gr.* and lessee assigns over, and assignee dies intestate,

Carth. 319.

lessor may have covenant against the *administrator* of

Spencer's

assignee, and declare against *him* as assignee. For such cove-

case.

nants bind those who come in by act of law, as well as by

5 Co. 17.b.

act of the parties.

Dougl. 736.

8. "With regard to *how far* the lessee or assignee are

"chargeable in covenant, there is a considerable difference.

"1. Lessee has, from his covenant, both a privity of contract

"and of estate: and though he assigns, and thereby destroys

*P. 349.

"the privity of estate; * yet the privity of contract con-

"tinues

C O V E N A N T.

"tinues, and he is liable in covenant, notwithstanding the assignments. But, 2dly, The assignee comes in only in Dougl. 441. privity of estate, and he therefore is liable only while in possession."

As to the first, therefore

If lessee assigns, though lessor accepts rent from the assignee, yet for the breach of any express covenant, though committed after the assignment, this action will lie against the first lessee, on the ground of the privity of contract still continuing. But an action of debt will not. 3 Co. Walker's case. Bernard v. Godscall. Cro. Jac. 309. Norton v. Ackland. Cro. Car. 418. S. P.

But as to the second,

If lessor brings covenant against an assignee of his lessee, Pitcher v. assignee may plead, "That before action brought, or cause of action accrued, he had assigned over." For the assignee is only chargeable in covenant for a breach committed while in possession, not for a breach after assignment. As was in this case the non-payment of rent. Tovey. Salk. 81. Show. 340. S. C. Chancellor v. Poole. Dougl. 735.

And it is no objection that the assignee may assign to a beggar; for it was lessor's folly to accept of the original assignee. But he is not without remedy since the lessee is still liable in covenant, or he may distrain on the land. S. C.

*And though the assignment was to a *feme covert* before the cause of action accrued, yet it is good. For a *feme covert* is of capacity to purchase, though her husband may disagree to it. Co. Litt. 3. a. 356. b. Barnfather v. Moffatt. Dougl. 435. *P. 350.

"But it is to be observed that this distinction now mentioned between lessee and assignee applies only to the case of express covenants in deed. For it differs in the case of covenants, which are collateral.

For if lessee assigns, for the breach of any express covenant, this action will lie against the lessee or his executor, or the assignee, for a breach committed after assignment, and after lessor had accepted rent from the assignee, but it will lie for a breach of a covenant in law, or which is collateral against the lessee only. Batchelor v. Gage. Sir W. Jones, 223. Cro. Car. 188. S. C.

10. "Covenant will lie against an assignee of part of the thing demised."

As where plaintiff demised two houses with covenant on the part of lessee for himself and assigns to repair; he assigned one of them, and for not repairing, lessor brought covenant against the assignee, and the action was held well to lie. Konan v. Kemise. Sir W. Jones, 245. Longham v. King. Cro. Car. 221. S. C.

11. "How far actual possession is necessary to maintain this action against an assignee, it has been decided."

*That by the assignment the title and possessory right passes, and the assignee becomes possessed in law. That as therefore an assignee is only liable while in actual possession, that if he assigns over, though his assignee has not taken actual possession, yet that he (the first assignee) is not liable to an action of *P. 351.* Walker v. Reeves. Mich. 22 G. 3. B. R. quot. Dougl. 444.

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of covenant. As here, where defendant was the assignee of the original lessee, and covenant being brought against him for rent reserved on the lease, he pleaded "That before the rent became due, he had assigned all his interest in the premises to one *Rigg*, who, by virtue of such assignment, entered, and was possessed. Plaintiff replied, that at the time when the rent became due, defendant *remained and continued in possession, absq. hoc*, that *Rigg* had entered, &c. And on demurrer it was held, that the assignment being admitted, the actual possession was not sufficient to charge the first assignee, the possession in law being in the second assignee by virtue of the assignment."

Eaton v.
Jacques.
Doug. 438.

But where the defendant was a mortgagee, and the mortgage was made in the form of an assignment of all lessee's term (which should regularly have been by an under-lease) it was adjudged, that the mortgagee could not be sued as assignee, he having never taken actual possession, and even though the mortgage had been forfeit. For the mortgage is only conditional, a security for money, not an actual transfer of property.

Spencer's
case.

5 Co. 17.
3 Ref.

*P. 352.

*12. If a man leases sheep, or any thing personal, and lessee covenants for himself *and his assigns* at the end of the time to deliver up the sheep or things so let, or such a price for them. If lessee assigns, this covenant shall not bind the assignee, for it is but a personal contract, and wants such privacy as is between lessor and lessee and his assigns, by reason of the reversion.

Bally v.
Wells.

3 Will. 25.

But it was resolved in this case, that a lease could be made of *tithes* with covenants which would extend to, and bind the assignee: The covenant was that lessee, his executors, administrators or *assigns* would not let any of the farmers of the parish of *Monkstown* have any part of their tithes.

I now shall consider, 2dly.

Covenant by the Assignee.

Noke's case.

4 Co. 80.

Spencer's
case.

5 Co. 17.

4 Ref.

1. Covenants in law, which run with the land, shall extend to the *Assignee*, who may maintain this action on them. As upon the words "demise and grant," the assignee shall have a writ of covenant if ejected; for as the lessee or assignee have the annual profits in return for rent, therefore for the loss of these he is entitled to a compensation from lessor.

2. "Assignees who come in *by act of law* shall have the "benefit of these covenants, and maintain this action."

As

of a copy
the lessee
dial law,
Vol.

C O V E N A N T.

As tenant staple by *statute merchant*, or *elegit*, or he who ^{5 Co. 17. a.} purchases a lease for years * sold under an execution, all * ^{P. 353.} these are assignees. So is tenant by the courtesy; so husband of *feme* lessee for years who survives; all of whom may maintain this action as assignees.

3. "No grantee of a reversion or assignee could take the Co. Litt. benefit or advantage of a condition or covenant for re-en- 216. Litt. try. It was therefore enacted by statute 32 H. 8. c. 34, ^{l. 347.} that all persons grantees of the reversion of any lands from the king, or grantees or assignees of any common person, their heirs, successors, or assigns, shall have like advantage against the *lessees* by entry for non-payment of rent, or for waste, or other forfeiture, as the said lessors or grantors themselves had."

On this statute it is to be observed,

1. That as the words of the statute are against *lessees*, it shall Co. Litt. not extend to *gifts in tail*. 215. a.

2. That the assignees of *part of the estate in reversion*, or Ibid. of a grant for years of part of the reversion in fee, may take advantage of the condition.

3. But the assignee of *part of the reversion* shall not take Ibid. advantage of the covenant; as if there be lessee of three acres, and the reversion is granted of two of them, grantee shall not have advantage of the covenant, for it is entire, and cannot be apportioned.

* 4. Whoever comes in by act of the party, as by bargain * ^{P. 354.} and sale of the reversion, is an assignee within the act; but it Co. Litt. is otherwise where one comes in by act of law, as the *lord by 215. escheat*, or to one who is in of another estate.

5. Grantee shall not take advantage of a condition before Ibid. he has given notice to lessee, but he may of a covenant. Cro. Jac. 476.

6. Grantee or assignee shall only take advantage of such Ibid. conditions as are for the benefit of the reversion, like those put, as for waste, non-payment of rent, &c. But not for paying a sum in gross, as delivery of corn or such like.

7. The assignee of the lessor may maintain covenant against 2 Show. the lessee, after lessee had assigned and he had accepted of 134. rent from the assignee, for such is within the statute.

So also assignee of the reversion, who hath accepted rent Sir James from the assignee of the lessee, shall nevertheless have cove- Brett v. nant against the executor of the lessee, and for a breach of Cumber- covenant done after the assignment; for it is a covenant in land. Cro. fact, and runs with the land, and the lessee by his own act Jac. 521. shall not discharge himself.

8. It was formerly (*Yelv. 222. Hob. 178.*) an opinion that Glover v. surrenderee of a copyhold was not an assignee within the sta- Black. Salk. 185. tute. But modern cases are otherwise. That the surrenderee of a copyhold reversion may bring debt or * covenant against * ^{P. 355.} the lessee within the equity, of stat. 32 H. 8. for it is a remedial law, and no prejudice can come to the lord.

C O V E N A N T.

Barker v. Beardwell. 9. Though by the custom of *London* an apprentice may be assigned, yet the assignee cannot have covenant on the indenture of apprenticeship; for there cannot be an assignee by custom, and he is no party to the contract.

Show. 4.

3. Covenant as by or against

Heir or Executor,

is now to be considered, as the next class of covenants, considered with respect to the person.

F. N. B.
343.

1. "Covenants real, or such as are annexed to the estate shall descend, and the action be brought either by or against the heir or executor, according to the estate and time of the breach."

"As to the estate, the heir shall have the action by reason of the reversion and injury to it."

Lougher v. Williams.
2 Lev. 92.
Skinn. 305.
S. C.

As where lessee for years covenanted to repair and leave in repair, it was held that the heir should have an action of covenant on this, though not named; for it was a covenant which run with the estate, and so should go with the reversion to the heir.

Vivian v. Campion.
Salk. 141.

*P. 356.

So where plaintiff declared on a covenant to repair, as heir to his ancestor, who died the 10 W. 3. and the breach was laid on the 3 Ann, and for * ten years before, which included the time the ancestor was living; and objection being taken for thus including the time of the ancestor, it was over-ruled by *Holt*, who held, that if the premises were out of repair in the ancestor's time, and continued so to the time of the heir, that it was a damage to the heir, and that he should recover, not with reference to the length of time that the premises were out of repair, but as much as should be sufficient to put them into repair.

2. As to the time of the breach the action is given to the executor, as in this case;

Lucy v. Levington.
2 Lev. 25.

Plaintiff as executor declared, that defendant had sold to plaintiff's testator, certain lands, and covenanted with him, his heirs and assigns, that he should enjoy against him and Sir *Philip Vanlore*, and all claiming under them, and assigned a breach that one claiming under Sir *P. Vanlore* had ejected his testator: It was objected, that the action should have been brought by the heir or assignee: But it was held that the eviction being in the life-time of the testator, he could not then have heir or assignee, and so the action belonged to the executor. *But quare*, if the reason might not also be that as the purchase was out of the personal estate of the testator, and the damages recovered would belong to it; that therefore the executor should bring the action.

2. The action of covenant lies against the heir or executor also, according to their estates.

C O V E N A N T.

* 1. Executors or administrators who come to any term of ***P. 357.**
lands or tenements, as such, are bound by the covenants which **Hob. 188.**
run with the estate, as belonging to the personal property of infra.
the testator or intestate.

As if lessor covenants with lessee to make him a new lease **Chapman**
at the end of his term, and lessee dies, his executor may have **v. Dalton.**
covenant on this, though not named. **Plowd.**
Com. 286.

" Where lands come to executor or administrator, they may **PerLeeCh.**
" be charged for a breach in their own time, as non-pay- **J. in Lyddell**
" ment of rent, or with an action of covenant, either in that **v. Metcalf.**
" right or as assignees; but there is this difference. **1 Will. 4.**

That if plaintiff declares against them *as assignees*, they are **Tilney v.**
charged as *tertenants*, and the judgment is *de bonis propriis*. **Norris.**

But if the action is brought against them, as executors or **Salk. 309.**
administrators, the judgment shall be *de bonis testatoris*, even **Buckley v.**
where the breach has been committed in their own time; as **Pirk.**
for repairs, *ex. gr.* For it is the testator's covenant which **Salk. 317.**
binds the executor, as representing him, and he therefore must **Collins v.**
be sued by that name. **Thorough-**
good.

2. " But covenants merely personal, descend exclusively **Hob. 188.**
" to the executor or administrator, and covenant lies only
" against them."

* As if *A.* covenants that *B.* shall serve *D.* as an appren- ***P. 358.**
tice for seven years, and dies, and *B.* departs within the time, **Bro. title**
covenant will lie against the executor of *A.* though not **Cov. 12.**
named.

4. I now proceed to covenant by

Husband and Wife.

By statute 32 *Hen. 8. c. 28.* it is enacted, " That in lea-
ses for life, or for years of the wife's land, the wife shall be
" a party to the lease, and the reservation be to her and her
" heirs; and therefore in covenant on such leases the wife
" should join."

But where the covenant is to baron and *feme*, the husband **Beaver v.**
alone may bring the action. **Laine. 2**

And where the lease was of land, of which the wife was **Mod. 217.**
tenant in common with another, and the husband and wife **Aleberry**
brought the action, it was held that the wife might or might **v. Walby.**
not join in the action. **1 Stra. 229.**

5. Of covenant by

Tenants in common.

In actions personal, tenants in common shall join: They **Litt. § 315.**
therefore should join in an action of covenant.

C O V E N A N T.

***P.359.** * Tenants in common of a *reversion*, on a lease for years, Kitchen v. shall join in covenant for not repairing; for it is in the performance merely. Buckley.

1 Lev. 109. 3. I shall now proceed to consider the cases under the head Sir T. of Pleadings in this action, premising the following cases as to Raym. 70. the persons who should bring the action. S. C.

1 Roll. Ab. 1. "Where the action is founded on an *indenture*, the person bringing the action, must be a *party* to the deed, or he 517. "cannot maintain the action."

Green v. As where in covenant, plaintiff declared, that *A.* being arrested at his suit, the defendant, in consideration that he would Horne. order the bailiff to let *A.* go at large, covenanted with plaintiff Salk. 197. to bring in the body of *A.* and deliver him to the bailiff, on such a day; and on *oyer* the deed appeared in *hæc verba*. *I.* (the defendant) do promise and engage myself to bring in the body of *A.* and deliver him to *B.* (the bailiff) on such a day. And on demurrer, it was held that the plaintiff should not have this action, he being no party to the deed. For though covenant may be brought on a deed-poll, in which no person certain is mentioned; but generally, "To all whom it may concern;" yet a person must be named in a deed indented, or he cannot have an action.

Nurse v. But where a deed began "it is agreed that, &c." and the Frampton. parties names were not mentioned in the body of the deed, Salk. 214. but at the end * was "in witness whereof we have hereunto set our hands and seals," and *both parties signed and sealed*, it was held that it was a sufficient naming in the deed, and that an action of covenant lay on it.

***P.360.** 2. "Wherever a covenant is for the benefit of any person, he must take notice and advantage of it at his own peril."

Hughes v. As where there was a covenant by the defendant (lessee) Richman. to permit the plaintiff (lessor) to sow clover among the defendant's barley; and plaintiff assigned a breach, that defendant had sowed the barley, *without giving him notice*. Defendant pleaded, that he *had not prevented* the plaintiff; and on demurrer, it was held sufficient, for defendant was only bound by his covenant to *permit*, and the notice should have been taken by the plaintiff, for whose benefit the covenant was.

I shall now consider the

PLEADINGS ON THE PART OF THE PLAINTIFF.

1. "The declaration in this action should set out expressly, that the covenant was made *by deed*."

Moore v. For where plaintiff declared in covenant, "That defendant Jones. *per scriptum suum factum apud Westminster*, granted 2 Stra. 814.

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to plaintiff," &c. *This was held to be error; for there were *P. 361.
no words which imported it to be a deed, without which the Cro. Eliz.
action could not be maintained. 517.S.P.

And where plaintiff so declares on a deed, he must always Thoresby
make a *profert* of it, and the court cannot dispense with it. v. Sparrow.
For defendant has a right to it by law, and this is the case, 1Will. 16.
though the deed appears to be lost, or to be in the defendant's 2Stra. 1186.
possession. S. C.

" But in declaring, plaintiff *should not set out the whole* Dundas v.
deed at length, or superfluous parts." Ld. Wey-

† As in covenant on a lease, it is sufficient to say, " That mouth.
defendant had, by indenture, demised certain premises to the Cowp. 665.
plaintiff (without naming them) subject, among other things, † Price v.
to such a proviso," and then state the covenant and breach. Fletcher.
This was by the order of the court. Cowp. 727.
S. P.

2. " Where the covenant is general, a general assignment
" of a breach is sufficient."

As where the covenant was, not to buy or sell for two years, Farrow v.
without leave of the plaintiff; and the breach assigned was, Chevalier.
" that defendant *diversis diebus et vicibus* between such a 1Salk. 139.
day and such a day, had sold to A. and several other persons
unknown, goods to the amount of 100*l.* After a verdict, it
was moved in arrest of judgment, that the breach was * un- *P. 362.
certain as to times and persons; but it was held to be suffici-
ent as a general assignment; for it was so described, that a
recovery in this might be well pleaded in bar to another ac-
tion for the same cause.

" But the most general assignment is in the words of the
" *covenant itself.*" As,

If lessor covenants, that he is seised in fee, or hath full Muscot v.
power to lease. In declaring in covenant, it is sufficient for Ballett.
plaintiff to say, " That lessor *was not seised in fee, or had* Cro. Jac.
not full power to lease." 369.
9 Co. 60.

And then the defendant must shew, that he had full power Hancock
to lease, or was seised in fee, *by shewing* what estate he had v. Field,
at the time of making the lease, which then puts plaintiff up- Cro. Jac.
on shewing a special title in somebody else. 170. S. P.

" But where the covenant is broken *by some act* of a third
person, it is not sufficient to state the breach generally for
" *that act* should be set out; but it should seem that it might
be sufficient to state that breach in the replication."

As where the covenant was to save harmless from all suits Nicholas
and lawful evictions. Defendant pleaded performance. Plain- v. Pullen.
iff replied, that one J. S. took out an *hab. fac. possession. debi-* 1Lev. 83.
modo exeunt, &c. and by virtue thereof expelled him. The 1Keb. 379.
defendant demurred, and had judgment; for *debito modo*, is 413.
sufficient, without shewing particulars. The *hab. fac.*
iff. always recites the term of the judgment, and that it *P. 363.
at least should be set out.

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2. "Where plaintiff assigns a breach, it should be so set out that it may appear clearly to be within the covenant."

Wingfield
v. Sher-
wood.
Stile v.

As where defendant covenanted in a lease, that he would not cut down *more timber than was necessary for repairs* of buildings. Plaintiff (lessor) assigned a breach, that defendant had cut down trees *to the value of 10l.* and converted it to his own use; and after a verdict, the judgment was reversed for error. For there should have been an averment, "That he had cut down more than was necessary for repairs." For as now assigned, it is not within the covenant.

"For such assignment of the breach was not within the words of the covenant, and so was bad for the uncertainty; for where the covenant *may not have been broken*, the declaration assigning the breach in that manner is ill."

Colt v.
Howe.
Cro. Eliz.
348.

As where the covenant was by the defendant that he, his executors, administrators, and assigns, would repair a mill, and breach assigned, the not repairing it by the defendant, his executors, administrators, and assigns. On demurrer the declaration was held to be bad; for the breach should be in the disjunctive "*or his assigns*;" for if any of them did repair, the action would not lie.

*P.364.

* 3. "Where there is a *proviso* in the deed, defeating the covenant, plaintiff need not set it out in his declaration, but leave defendant to plead it."

Elliot v.
Blake.
Sir T.
Raym.65.

As on a covenant to deliver so much salt-petre, before the 20th of *October*; and there was a proviso, that if defendant *was prevented by the sea*, that the deed should be void. It was held, that plaintiff need not state the proviso.

"But where there is an *exception*, making part of the covenant, plaintiff, in setting out the breach, should also shew that the breach was not within the exception: For the declaration is on *the whole covenant*, and the breach will not be within it, unless so set out."

Sir T. Jones
125.

As where plaintiff declared on a covenant by the defendant, to repair all the pales of a garden then demised, except those to the East side, and assigned the breach, in not repairing *sec. formam conventionis*. This was held well after a verdict; but it was agreed, that it would have been bad on special demurrer, for want of setting out "that the pales were not those excepted."

And note, "That if plaintiff declares on a covenant, which he sets out, and afterwards assigns an inconsistent breach under a *sciz.* that this shall be rejected."

*P.365.

Hayman v.
Rogers.
1 Stra.232.

* As where plaintiff declared upon articles, dated the 30th of *December 1718*, not to set up the trade of a baker, from the date of those articles for so many years, and afterwards assign'd a breach, "That defendant did *afterwards*, to wit, 1st of *May 1718* follow a trade." This being inconsistent with the articles, was rejected.

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4. "Where a covenant is in the alternative, that is where
"covenantor undertakes for one of two things, breach should
"be assigned as to both."

As where defendant covenanted, that he would not take Sherwood
wood without the assent or assignment of the lessor or assigns: *v. Noon.*
It was held not sufficient to say that defendant took wood, *1 Leon. 250.*
without the assignment of lessor, or his assigns; for it might
be with *their assent*, and so no breach.

But where the covenant was "to pay or cause to be paid," *Aleberry*
that defendant had not paid, was held to assign the breach suf- *v. Walby.*
ficiently, without saying "or caused to be paid;" for if de- *1 Stra. 229.*
fendant had caused to be paid, he had paid.

"But where the covenant is founded on the contingency
"of two things, and *that which shall first happen*, plaintiff
"may declare, on a breach arising from the happening of
"one of them, without making any mention of the other."

As where plaintiff declared on a covenant, whereby it was *Loggin v.*
agreed, that he should deliver * to defendant a mare, and de- *Ld. Orrery.*
fendant was to pay for the same twenty guineas, at the death *1 Ld. Raym.*
of his mother, or day of marriage, whichever should first *132.*
happen. It was adjudged, that it was sufficient, in de- **P. 366.*
claring on the covenant, to state *the happening of one of the*
contingencies, without saying, that it was the first, and that
if even the other had happened first, the declaration was still
good; for the delay was the plaintiff's own.

5. "Where the action is for breach of covenant by the
"act of a third person, the declaration should set out, that
"the breach was by such a person, *under a claim of title or*
"*by lawful act*"; for the covenant on the part of covenantor
"does not extend to the illegal acts of others, who are them-
"selves liable to an action.

As where lessor covenanted that lessee should hold the *Lanning v.*
lands discharged of payment of tithes, and the breach assigned *Lovering.*
was, a recovery of them in an action by the parson. It was *Cro. Eliz.*
held on demurrer, that the breach was ill assigned; because *917.*
he had not alledged, *that the suit was lawful, or the tithes*
due; for the covenant did not extend to illegal suits.

"The questions under this head are those which for the
"most part arise under the express covenant for quiet enjoy-
"ment, or the covenant in law under the demise, and an
"expulsion by a third person.

* "The declaration therefore should always state the dis- **P. 367.*
"turbance or eviction to be by a person *by claim of title*, and *Kirby v.*
"not of title only but of good and *elder title*; for perhaps *Hantaker.*
"the eviction might be by a person claiming *under the lessee* *Cro. Jac.*
himself."

315.
Wootten.
v. Hale.

1 Lev. 301.

Therefore, S. P.

C O V E N A N T.

Nokes
Case. 4 Co.
80. b.

Therefore, where plaintiff declared, on a demise of a house in *London*, and covenant that lessee should enjoy without eviction from lessor, or any claiming under him, and breach assigned, "That one *Savery* had recovered the house in ejectment by verdict, and expelled the plaintiff. On demurrer, it was adjudged, that although the recovery was by verdict, yet that plaintiff ought to have shewn *that Savery had elder title*; for otherwise the covenant in law was not broken.

2 Lev. 37.

"But it is sufficient, in such a case to assign the breach "by act of a person claiming by elder title, *without stating what that title is*; for perhaps the plaintiff may not know "the title of the person expelling him."

And therefore, if it appears from the declaration itself, that the claim was by elder title, and not under plaintiff himself, it is good, without setting it out as *elder title*.

Proctor v.
Newton.
2 Lev. 37.

As where defendant declared on a demise to him for a year, and breach assigned, was, that *J. S.* who had title by virtue of a demise made to him of the same land, before that made to the plaintiff, had enter'd and evicted him. It was

*P. 368.

held to be well, on motion, in arrest * of judgment; for the title appear'd sufficiently to be an elder one, and not under the plaintiff.

"And so where the breach is by a person included in the "covenant. It is not necessary to state any title as to "him."

Force v.
Vines.
2 Roll. Rep.
21.
Ratcliff's
Case.
1 Brownl.
80. S. P.
Smith v.
Sharp.
1 Salk. 139.

As where lessor covenanted, "That during the term neither *he, his heirs or executors*, should interrupt lessee." And the breach assigned was by entry of *the executors* of lessor, it was held, that no title need be set out as in them, they being included in the covenant on the part of the lessor.

6. How far the breach should be assigned, as affecting assignees, the distinction is settled in this case, *viz.* That where a thing is to be done *by* a man or his assigns, the breach must be in the disjunctive: That it was not done by him *or* his assigns. But where the act is to be done *to* a man or his assigns, it is sufficient to assign the breach, that it was not done to *him*, without mention of his assigns.

"But it should seem that the rule here laid down is "only the case where the action is not against the first "covenantee or lessee."

Gyse v.
Ellis. 1 Stra.
228.

For where the covenant was on a lease to defendant, by which he covenanted, he, his heirs and assigns, every year, to plant eight crab-stocks; and breach assigned, that *he* had not planted such a year. It was held to be well without mentioning *his assigns*; for the * action being against

*P. 369.

the first lessee, an assignment was not to be presumed.

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So where defendant covenanted for himself, his heirs and assigns, to pay rent, &c. ; and the breach assigned was, that he had not paid, without saying "or his assigns," the court held the breach well assigned ; for they would not presume an assignment.

7. "If plaintiff, in declaring in covenant, should state the estate under which he derives his right to the action, and he *mistakes* it, it is his error."

Plaintiff, in stating his title, set forth, that one *Strobridge*, who was seised in fee, made the lease in question, and that on his death the estates in reversion descended to the wife of the plaintiff, as his heir at law, whereupon he (the plaintiff) became *seised of the reversion, as of freehold, in right of his said wife*. On demurrer, the declaration was held to be ill ; for from his own shewing, the estate he had, was in him and his wife, in right as of fee, and not as stated.

But it was agreed, in this case, that plaintiff *need set out no title, but declare generally "quod dimisisset."* And it was there settled, that where he had set out the title *imperfectly* (as in not regularly setting out a descent, by omitting the person under whom plaintiff claimed) that this was surplusage, and could be rejected. But, if the title had been stated *wrong*, as in the last case, it had been error.

* 8. "In covenant, to pay a sum certain, there can be no apportionment of demand, for the breach must follow the covenant which is entire."

Therefore, when plaintiff declared, on a charter-party, whereby defendant covenanted to pay the plaintiff so much, *viz. 3l. per ton* for goods imported, and assigned a breach in not paying for so many tons, and *one hog shead*. On demurrer, the breach was held to be ill assigned, in charging for the hog shead, the covenant being only so much *per ton*. But *aliter* had it been to pay so much *per ton secundum ratam*.

So, where the covenant was, that defendant was to take plaintiff for his clerk, and allow him *2s. per quire* for what he should copy, and breach assigned, the non-payment for four quire and *three sheets*. Judgment was in this case reversed ; for there could be no apportionment for the three sheets.

But where plaintiff so claims more than the contract will support, he may enter a *remittitur* for what he has claimed too much, and take judgment for the rest, where the demand is not settled to a certain amount by the deed, but depends on something extrinsic ; for if the demand is so settled as if it be a covenant to pay *20l.* there can be no *remittitur*.

9. Where there is a joint covenant by several, all should join in the action, or on demurrer on *oyer* it will be bad.

Mayor of London v. Sir Fisher Tench. Mich.

1733.B.R.

Bull.N.P.

164.

Polyblank v. Hawkins. Dougl.

314.

But

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*P. 371. * But if any named in the indenture have not sealed it, S.C. Bull. they should be excluded by an averment to that effect. But N.P. 158. advantage must be taken by pleading in abatement, if the action is brought *against* part only of the covenantors.

Barker v. 10. Covenant for non-payment of rent must be brought Damer. where the lands lie, though the rent be made payable in 1 Salk. 80. another place. As here where the lands lay in *Ireland*, and 1 Show. 191. the rent was reserved to be paid in *London*. It was adjudged, S. C. that the action should be brought in *Ireland*.

Thrale v. And 'tis the same in debt for rent.

Cornwall. 11. "Where plaintiff cannot sue on a breach of covenant, 1 Wilk. 165. "without some previous circumstances to be performed, the declaration should aver the performance of them."

Crookhay As where defendant covenanted to satisfy the plaintiff for v. Wood- all sums of money which defendant's son should embezzle ward. Hob. whilst apprentice to the plaintiff, *within three months after* 217. *proof and request made*, the declaration laid only the embezzlement and request, but not the time or proof. The plaintiff had a verdict; but judgment was arrested for this fault.

9. I shall now proceed to the consideration of the

*P. 372. *PLEADINGS *on the Part of the* DEFENDANT.

1. The first plea is that of *performance*.

Co. Litt. As to which plea, 1. "If all the covenants in an inden- 303. b. ture are in the affirmative, defendant may plead *performance generally*; but if any are in the negative, he must "pled to those specially, for a negative cannot be per- "formed, and to the rest generally."

Cresswell And if he pleads otherwise, on demurrer, defendant shall v. Peachy. have judgment.

Cro. Eliz. Therefore, where defendant covenanted by charter-party, 691. that he would sail from the *Thames* to such a place in *Spain*, Laughwell and the words were, "That he *decideret procederet et non* v. Palmer. *deviet*." He pleaded performance generally, and it was held 1 Sid. 87. ill; for there was an express negative covenant, "That he should not deviate," to which he should have pleaded specially; for though he sailed from the *Thames* to *Spain*, he might have deviated.

Ellen v. And the case is the same in debt on a bond for per- Bote. formance of covenants. Performance is a bad plea; for some Allyn 72. of the covenants might be negative.

Co. Lit. "So if any of the covenants is in *the disjunctive*, he must 303. b. "*show which* he has performed."

"So

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* "So where the covenant is for the act of a stranger, *P. 373.
 "performance generally is a bad plea, it should shew how Show. 1.
 "performed."

2. "A covenant in one indenture shall not be pleaded in
 "bar to a covenant in another indenture, except such be a
 "defeasance of the former; for perhaps the injuries may not
 "be equal."

As where plaintiff declared, That defendant, by inden- Gawden v.
 ture, covenanted to pay to plaintiff 300*l. per ann.* so long as Draper.
 his wife should live with and be supported by the plaintiff, 2 Vent. 217.
 and the action was for one quarter's salary. Defendant
 pleaded, That afterward, there was another indenture made
 between the same parties, that whenever the said defendant
 and his wife should come and cohabit together, that the al-
 lowance should cease, and pleaded further, that they did co-
 habit. On demurrer, it was ruled to be a bad plea, and that
 defendant should have an action on his indenture but could
 not plead it in bar of that covenant in the other.

But though a defeasance may, (it should seem), be so Clayton v.
 pleaded in bar; yet the second deed must appear to be in- Kynaston.
 tended to operate as a defeasance, and contain proper words for and Lacy
 that purpose, "as reciting the first deed, and declaring it to v. Kynaston.
 be thereby void." 2 Salk. 573.
 and 575.

"But one covenant in a deed may be pleaded in bar to a
 "covenant in the same * deed; for the sense of the parties *P. 374.
 "is to be collected from the whole of the deed."

As in covenant for rent, defendant was allowed to plead, Johnson v.
 another covenant in the same indenture, that he (as lessee) Carre.
 might retain so much of the rent for repairs and charges. 1 Lev. 152.

3. "In this action defendant cannot plead *nil habuit in* Heath v.
 "*tenementis*. For the indenture is an estoppel. Vermeden.
 3 Lev. 146.

"So neither shall defendant plead a plea which amounts
 "to *nil habuit in tenementis*; though not so in terms."

As where plaintiff declared, as assignee of the reversion Palmer v.
 from one Palmer who had by deed demised the premises in Ekins.
 question to the defendant for twelve years then unexpired. 2 Stra. 317.
 Defendant pleaded, That ten years before the making of the
 lease to him, that Palmer had sold the reversion in fee to one
 Bragg, and traverses the seisin of Palmer, as alledged by the
 plaintiff. To this plea there was a general demurrer, and
 the court resolved, 1. That defendant's plea was tantamount
 to *nil habuit in tenementis*; for it denied the seisin in fee in
 Palmer, who had demised to him by deed, and so was bad in
 law. 2. That the plaintiff, who was assignee, should have
 the benefit of this estoppel, which runs with the land. 3.
 That the estoppel need not be replied, but should be taken
 advantage of on demurrer, and that the plea in the present
 case was bad on a general demurrer.

COVENANT.

*P. 375.

Friend v.
Eastbrook.
2 Black.
Rep. 1152.

2 Co. 28.

*4. "*Non est factum* is a good plea in this action."

But where defendant pleads *non est factum*, he cannot controvert the lessor's title; for the issue is only on the existence or goodness of the deed.

"Defendant may, under this plea, shew that some of the covenants in the deed have been altered or erased, or he may plead it;" for if any covenant be altered or erased, the whole deed is discharged: For the deed is a complication of all the covenants, so that by changing any, the deed remains no longer the same.

5. "*Entry and eviction* is a plea in this action; but it must be pleaded to be such as disabled defendant from performing his covenant."

Barker v.
Fletwell.
Godb. 69.
20.

As where lessee covenanted to build an house upon the land within ten years, and lessee assigned the term. On action brought for non-performance defendant pleaded, That the lessor had entered and held possession for part of the ninth year. *Per Cur.* defendant should have shewn that lessor entered by wrong, and held him out, so that he could not build; for perhaps lessor's entry might have been lawful, as for non-payment of rent, which in fact was the case.

Carril v.
Read.
Cro. Eliz.
374.

*P. 376.

*So where the covenant was by lessee to drain such water out of the land before such a day, and on covenant for non performance, he pleaded, that before the day lessor had entered and expelled him, and continued in possession till after the day. This was adjudged to be a bad plea; for it was a collateral act, and he should have set out "that he was prevented by lessor."

"For if the covenant could be performed, an entry shall not excuse the non-performance."

Snelling v.
Stagg and
Andrews.
Mich. 26
Car. 2. C. B.
Bul. N. P.
165.

As where, on a demise of a messuage with appurtenances, defendants covenanted to repair, and breach assigned in not repairing; defendant pleaded, an entry by the plaintiff, in *atrium posterius of the messuage*. The court held this to be no plea; for an entry into the back-yard cannot suspend the covenant to repair the messuage, of which he was still in possession: though by such entry the rent was suspended.

6. Another plea in this action is a *Release*.

Co. Litt.
292. b.
Eccles v.
Lambert.
Alleyn 38.

And if before a covenant is broken, the covenantee releases to him all actions, suits, and quarrels, this doth not discharge the covenant itself; because that at the time of the release, there was no debt, duty, or cause of action.

But in that case, a release of all covenants, is a good discharge of the covenant before it is broken.

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*So neither is a release of *all demands*, a bar to an action of covenant, which has been broken after the release.
 †But wherever a discharge is pleaded in the nature of a release, defendant must plead it to be *by deed*, or it will be bad. For as the covenant is by deed, by deed only shall it be discharged. *Blake's case*, 6 Co. 44, a.

§ And note, that where a covenant runs with the land, and the lease has been assigned, the covenantee cannot release a covenant after it is broken, and action has been brought by the assignee, for the right of action is then attached in his person. But if covenantee had released before a breach or action brought, it had barred the assignee even for a breach in his own time.

7. "*Accord and satisfaction* is another good plea in covenant. For though this action is founded on a deed, and a deed can only be discharged by a deed, yet this is a good plea, for it is not pleaded in discharge of the covenant itself, but only in discharge of the damages, for the covenant remains."

As when to breach assigned on a covenant, defendant pleaded an accord or agreement, "that plaintiff should take thirty shillings in satisfaction of all damages;" it was on demurrer ruled to be a good plea for the reason above. For in every action where damages are demandable by way of amends, accord is a good plea in discharge.

*"But it is only a good plea where there has been an actual breach; for not till then are damages claimable."

For where plaintiff declared, that in consideration that he would permit S. P. to enjoy a farm at *Chapsham* for one year, defendant covenanted to pay the rent of 72*l.* per ann. and also 200*l.* then in arrear, and the breach assigned was, the non-payment of the rent. Defendant pleaded, that *before any cause of action did arise on the covenant*, that it had been agreed between him and the plaintiff, that plaintiff should take 30*l.* in discharge of all covenants, which plaintiff had accepted. On demurrer this plea was held to be a bad one, for at the time there was no covenant broken, and accord and satisfaction is no good plea, except in discharge of damages for a covenant actually broken or damages sustained.

8. Another plea is, that of *tender and refusal*. But in this action the damages, not the debt being the thing in demand, it need not be pleaded with an *uncore prist*.

9. In covenant for non-payment of rent, the defendant cannot plead *levied by distress*; for that is a confession that it was not paid at the day, but *riens in arriere*, or payment at the day, will be a good plea.

Field v. Hancock.
Cro. Jac.
 487.
 *P. 377.
 †*Rogers v. Payne.*
 2 Will. 376.
 § *Middlemore v. Goodall.*
Cro. Car.
 361, 503.
 1 Roll. Abr. 411.

6 Co. *Blake's Case*, 43.

Alden v. Blague.
Cro. Jac. 99.

*P. 378.

Snow v. Franklin.
Lutw. 358.

Carter v. Downish.
 1 Show. 137.

Hare v. Saville.
 2 Brownl. 273.

C O V E N A N T.

Gilbert v.
Fletcher.
Cro. Car.
129.

*P. 379.

Fish v.
Miller.
Gib. Rep.
123.

Mayor v.
Steward.
4 Burr.
1444.

10. *Infancy* is another good plea in this action, for an infant cannot bind himself by deed, except for necessities. This action was covenant against an apprentice, brought on *the indenture, and held not to lie, he being an infant.

11. If defendant has leave to plead double, under statute 4 and 5 *Ann. c. 16.* he shall not be allowed to plead inconsistent pleas, as *non est factum*, and a condition precedent.

12. Defendant was assignee of a lease, and covenanted to repair, pay rent, and indemnify the plaintiff, who was the person assigning. On covenant brought and breach assigned as to all, defendant *pleaded bankruptcy*, and it was adjudged that this being an *express* and collateral covenant was not discharged under the bankruptcy and certificate, for it was not a *debt* due at the time of the bankruptcy, and so could not be proved under it.

10. Having now considered the nature of this action and the pleading on it, the subsequent proceedings now alone remain, the verdict and judgment. But I shall previously mention this case relative to payment of money into court.

Upon a general count in covenant, money cannot be paid into court; for the action is for *damages*, which are uncertain. But on a special count for a liquidated sum as for rent, or for *5l. per acre* for ploughing meadow, the court will allow it.

Fullwell v.
Hall.
2 Black. 837
Walnouth
v. Hough-
ton.
2 Barn. 229.

*P. 380.

*OF THE VERDICT AND JUDGMENT.

Vivian v.
Campion.
Salk. 141.

1. Where covenant is brought, and breach assigned the not repairing of houses according to covenant, the damages ought to be such as are sufficient to put the premises in repair at the time of the action brought, and to that purpose they ought to be applied.

Farrer v.
Snelling.
1 Roll. Rep.
351.
3 Bulst. 155.

2. In covenant for non-payment of rent at divers days, which amounts to so much, and in the declaration the sum is mis-cast, it is not error, but plaintiff shall have a verdict for so much as is really in arrear.

Anon.
Cro. Eliz.
685.

3. Where the breach was assigned in two covenants, and it appeared that [for one plaintiff had no cause of action, and for the other a good cause of action, issue being joined on both, and a general verdict found, and damages entire, judgment was arrested, for, for part plaintiff had no cause of action.

Porter v.
Harris.
4 Lev. 63.

If covenant be brought against *two*, and there be judgment by default against one, and the other pleads performance, which is found for him, the plaintiff shall not have judgment against the other; for, on the whole, plaintiff has no cause of action.

C O V E N A N T.

5. In covenants perpetual, if they be once broken, and an action brought on the covenant and judgment for the plaintiff, this judgment shall stand, and in case of a future *breach, plaintiff may have a *scire facias* on this judgment, *P.381. Swan's case. Cro. Eliz. 3.

And after a judgment by default, a writ of inquiry executed, and damages assessed, defendant may move in arrest of judgment. Chauntflower v. Priestley, et al. Executors. Cro. Eliz. 914.

And note, that where there is a special penalty in a covenant (as a charter-party, *ex. gr.*) plaintiff may either go for the penalty, and rescind the contract, or bring an action on the case for breach of contract, and waive the penalty, in which case he may recover more than the penalty. Winter v. Trimmer. 1 Black. Rep. 395.

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*P.382.

HAVING now treated of actions arising upon *contracts*, I shall proceed to those which are founded upon *torts*.

These actions were originally divided into actions of trespass *vi et armis*, and actions of trespass *on the case*.

These constitute the several actions of

1. Assault and battery, false imprisonment, and adultery; or trespass considered with reference to the *person*.
2. Replevin and trespass; trespass with reference to *personal property*.
3. Ejectment; trespass considered with reference to lands or *real property*.

CHAP.

ASSAULT AND BATTERY.

*P.383.

*CHAPTER IV.

THE ACTION OF ASSAULT AND BATTERY.

Finch's
Law 202.

1. *ASSAULT* is the unlawful setting upon "the person of any one, by the offer or attempt to beat, though without touching the person: As by raising a stick or fist to strike, making a blow at a person, but missing him: So lying in wait, besetting one's house, is an assault in law."

Hawk.
P. C. 133.
Anon.
1 Mod. 3.

But words alone will not make an assault; though what might otherwise be deemed an assault, words might explain away: As if a person lays his hand on his sword, as to draw it, this might be deem'd an assault; but when the party added, "If this was not assize-time, I would not take such language." These words explained away the implied assault.

"Battery is the actual commission of violence to the person, as, by beating, striking, pushing violently, or doing any such injury, in an angry or spiteful manner.

*P.384.

"Under this head too falls *mayhem*, which is a more heinous kind of battery; that of wounding and depriving a person in consequence* of it, of any member necessary for his defence. As an arm, hand, eye," &c.

In this action I shall consider, 1. What shall constitute an assault and battery; 2. What shall excuse it; 3. The pleadings on the part of the plaintiff and defendant; 4. The verdict, damages, and costs.

1. WHAT SHALL CONSTITUTE AN ASSAULT AND BATTERY.

1. "The act causing the injury to the plaintiff need not proceed from the *immediate assault or act of the defendant*, for any wanton act by which another person or thing causes a battery, will support this action."

Scot v.
Shepherd.
3 Will. 403.
2 Black.
Rep. 892.
S. C.

As where defendant threw a lighted squib into the marketplace, which being toss'd from hand to hand, by different persons, at last hit the plaintiff in the face, and put out his eye. This action was adjudged to lie, though the injury was not caused by the *immediate* act of defendant himself.

Short v.
Lovejoy.
coram Lee,
C. J.
G. Hall.
1752.
Buller N.P.
16.

So, if a person pushes a drunken man against another man, and hurts him, this is actionable, as an assault and battery. But if defendant intended to do a right act, as to assist him in going along the street without help, and in so doing an injury is done, he will not be answerable.

So

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* So if by a sudden fright an horse runs away with his rider, and runs against a man, it is no battery, and this may be given in evidence on the general issue; but if any person had whip'd the horse, and made him run away with the rider, and hurt a third person, or the rider himself, he would be liable who had whip'd the horse. *P. 385.
Gibbons v. Pepper.
4 Mod. 405.
Salk. 6. 37.
S. C.

"So that it appears from this case that the injury should be wilful; for if not wilful, and done without default, the action will not lie." As if a soldier at exercise, by accident hurts his companion, it is not actionable.

2. "Where a person receives a bodily injury, in consequence of an act done by his own consent, he shall not maintain this action."

As where two persons play'd at cudgel by consent, and one hurt the other, it was held to be no battery; for *volenti non fit injuria*. Weaver v. Ward.
Hob. 138.
Dalt. c. 22.

3. "But in such case the act from whence the injury proceeds must be lawful."

For where, in this action, defendant would have given in evidence, that the plaintiff and he box'd by consent, from whence the injury proceeded, it was held to be no bar to the action; for as the act of boxing was unlawful, the consent of the parties to fight could not excuse the injury. Boulter v. Clerk at Abingdon 1747.
Bull. N. P. 16.

* And in this case it was held, that if one license another to beat him, such licence is void; because it is against the peace, and plaintiff had in this case a verdict and damages. *P. 386.
Matthew v. Ollerton.
Comb. 218.

And note, that if two commit a battery, and one of them dies after issue joined, yet shall the action continue against the other. Hill v. Tempest.
Cro. Eliz. 145.

2. WHAT SHALL EXCUSE OR JUSTIFY THE DEFENDANT IN THIS ACTION.

1. "Wherever a person is acting under any authority given to him by law, that shall be a sufficient justification."

As, 1. "If an officer has a writ or warrant, against a person, who will not suffer himself to be arrested, he may justify a beating or even wounding in the attempt to arrest him." Hawk. P.C. 130.

But a battery cannot be justified by an arrest only, it will only justify the assault; for to justify a battery, resistance or an attempt to rescue himself out of custody should be shewn, unless it be by way of *molliter manus imposuit*, in which way alone defendant may justify the beating, without shewing any resistance or attempt to rescue. Williams v. Jones.
2 Stra. 1049.
Titley v. Foxhall.
Trin. 31 C.
2. C. B.
Bull. N. P. 19.

And where a person justifies an assault and battery, by virtue of a sheriff's warrant, he need not shew the warrant; for that must be returned to the sheriff. Bateman v. Woodcock.
Cro. Jac.

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***P. 387.** * 2. So in the exercise of his office a *churchwarden* may justify taking off the hat or laying hands on a person who is *disorderly in church* and turning him out for disturbing the congregation.

Lane v. 3. So defendant may justify even a mayhem, if done by
Degberg. him as an *officer of the army*, as a *punishment* to plaintiff for
Hill. 11. *disobedience of orders, or other military crime*. And defendant
W. 3. may give in evidence a petition by the plaintiff to a council
per Treby of war against him, and if by their sentence the petition was
C. J. dismissed, 'tis conclusive evidence for the defendant.
Bull. N. P. 19.

Leeward v. 4. A man may justify against any one *who assaults his wife,*
Bafely. *parent or child*, in their defence: So a wife may justify an
1 Ld. assault in defence of her husband. A servant may in like
Raym. 62. manner justify an assault in defence of his master; but a
Salk. 407. master can't justify an assault in defence of his servant:
S. C. For the master may have an action against the person who
beats his servant, with a *per quod servitium amisit*; but the
servant can have no such action for beating his master.

Same Case. 5. So one may justify the battery of a person who endea-
and 1 vours wrongfully to *dispossess him of his lands, or to take*
Hawk. away his goods. But in the case of an entry on the lands,
P. C. 130. it must not be justified as a battery, but as a *molliter manus*
impositus.

***P. 388.** * And where the injury is a mere breach of a person's close,
Green v. defendant cannot justify a battery, *without a request to de-*
Goddard. *part*: but 'tis otherwise if one breaks down a gate, or enters
2 Salk. 641. *vi et armis*; for there 'tis lawful to oppose force with
force.

Hawk. P. C. 6. "A *parent* may give reasonable correction to his
130. *child*; a *master* to his *servant* or *apprentice*; a *schoolmaster*
"to his *scholar*, or a *gaoler* to his *prisoner*." All these,
therefore are special justifications.

7. "Wherever the assault or battery has proceeded from
"the plaintiff's own fault, it is a sufficient justification for
"the defendant."

Ward v. As where plaintiff and defendant being at play, the
Ayre. plaintiff thrust his money into defendant's heap, upon which
Cro. Jac. defendant kept it, and then a dispute and struggle took
366. place, which was the assault for which this action was
brought. The court held the defendant justified and not
guilty; for the first fault proceeded from the plaintiff, as so
a man might be made a trespasser against his will.

8. Under this head falls the most usual justification in this
action, viz. "That of *son-assault demesne*, or that the first
"assault proceeded from the plaintiff himself."

Bull. N. P. If defendant proves that the plaintiff first lifted up his stick
18. to strike him, and offered so to do; it is a sufficient assault
to justify his striking the plaintiff; for he need not stay till
the

ASSAULT AND BATTERY.

* the plaintiff has actually struck him, for he might be disabled by the blow. *P. 389.

"But there must be some proportion between the battery given and the first assault; for every assault, however small, will not justify an enormous battery."

And the rule is laid down by Lord Holt, in this case, who Cockcroft v. held that the meaning of the plea was, *that defendant struck Smith, in his own defence*: so that if *A.* strikes *B.* and a scuffle ensues, and the parties close immediately, and in the scuffle *A.* is even mayhem'd by *B.* that is to be justified under *son-assault*: But if, upon a little blow given to *B.* he gives a blow in return, which mayhem's *A.* that is not justified under *son-assault demesne*. For the reason, why *son-assault* is a good plea in mayhem is, because it might be such an assault as would endanger defendant's life. ^{2 Salk. 642.}

Therefore, in this case, the Chief Justice directed the S. C. jury to give a verdict for the defendant in a mayhem, the first assault being by tilting the form whereon the defendant fat. ^{1 L. Raym. 177.}

But if the assault has happened in a *church-yard*, *son-assault demesne* will not justify defendant; for the law so abhors violence in churches or church-yards, that it will not allow a man to strike there, even in his own defence. ^{Francis v. Ley. Cro. Jac. 367.}

* 3. I shall now consider the PLEADINGS and EVIDENCE. *P. 390.

And first,

1. OF THE PLEADINGS ON THE PART OF THE PLAINTIFF.

1. The declaration in assault and battery cannot lay the offence on a day certain, *at divers other days* and times; for an assault is one individual act, a distinct offence, and cannot be laid with a *continuando*. ^{Michel v. Neal & ux. Cowp. 828.}

2. The offence should be charged fully and positively, and not by way of recital as "*whereas A. B. on such a day made an assault.*" This is where the action is by bill in the *King's-bench*. ^{Amyon v. Shore. 1 Stra. 621.}

For in the court of *Common Pleas* such declaration would be good; for in that court the writ being set out in the declaration, helps the want of a positive averment. ^{White v. Shaw. 2 Wils. 203.}

But if the declaration is so in the *King's-bench*, the defendant should take advantage of it by special demurrer; for it will be good after a verdict. ^{Douglas v. Hall. 1 Wils. 99.}

3. For a battery of the wife, the husband and wife should join in the action, and the damages be laid *ad damnum ipsorum*; first, because the husband is damnified by being ^{Neale v. Hatter. 2 L. Raym. 1208.}

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Horton v. Byles. Sid. 387. S. P. put to expence for her cure, and in suing the action: * and 2dly, because the action and damages survive to the wife, to whom the injury has been committed.

*P. 391. And therefore, where the action was by husband and wife, for a battery of the wife, and laid *ad damnum ipsius* (viz. the husband) the judgment was arrested; for so the damages would not survive to the wife, they being recovered only to the husband. So if the assault and battery has been committed against *both husband and wife*, he must bring his action alone for *the injury done to himself*; for the wife cannot join in an action for an injury done to the husband: and therefore where a joint action was brought for such battery and damages separately assessed, the writ abated *quoad* the husband.

Newman v. Smith. Salk. 642. 4. Plaintiff, in his declaration in this action, may lay many things in aggravation, for which he himself could not maintain an action. As here, "for making an assault on himself, entering his house and assaulting his servants," &c.

King v. Phippard. Comb. 288. 5. If defendant pleads *son-assault demesne*, and the plaintiff can justify, he should plead it; for he cannot give it in evidence, under the general replication of *de injuria sua propria*.

Note, in this action as in all others founded on torts, if the battery has been done by several, the plaintiff may bring his action either jointly or severally.

* 2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

*P. 392.

Bull. N. P. 17. 1. To this action there are three species of defence: The first is the *general issue*, not guilty; the second, *matter of excuse*, as, that it was done by accident, and without defendant's default, &c.; which may also be given in evidence on the general issue: the third is a *justification*, which insists upon some matter, which made it lawful for defendant to make the assault. But a *justification must always be pleaded, and cannot be given in evidence on the general issue*. As upon the general issue he cannot give *son-assault demesne* in evidence; for it is a justification which we have treated of before.

Co. I. itt. 182. b.

2 Hawk. 333.

2. "If an *indictment* has been preferred for the same assault, and defendant confessed it, and a *cognovit indictment* been entered on the record, it estops defendant to plead not guilty to an action of the same offence."

Gibbon v. Pepper. Salk. 607.

3. If defendant *justifies* the assault and battery, he must confess it, or on demurrer, plaintiff shall have judgment.

4. "The plea should go to the whole offence as charged in the declaration, or plaintiff shall have judgment. But if the plea is a justification, it shall go only to that part"

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" of the offence, of which it takes notice : *son-assault* goes to the whole."

For where, in trespass for assault, battery, and *wounding*, defendant pleaded, that he was * constable of *D.* and for a *P. 393. misdemeanor of the plaintiff's, that he laid hands on him, and carried him to the stocks, *quæ est eadem transgressio*. On demurrer, plaintiff had judgment; for the plea is a justification, and goes only to the assault and battery, but takes no notice of the *wounding*, which is charged in the declaration. Pindlebury v. Elmott. Cro. Eliz. 268.

" Neither is the general traverse as to the rest, sufficient."

For where, in assault, battery, and *false imprisonment*, defendant justified the imprisonment under process of an inferior court, but said nothing more than a general traverse to the assault and battery; plaintiff had judgment; for it was not sufficient to justify the imprisonment alone, though it includes a battery; but defendant should have pleaded to the assault and battery, by shewing resistance made to the arrest. Truscott v. Carpenter. L. Raym. 229.

4th. In an action against a *servant*, if he pleads a justification in defence of his master, he must plead it thus, " That the plaintiff would have struck his master if he had not interposed, and struck the plaintiff, *prout ei bene licuit*." For the servant can only strike to prevent an injury, not by way of revenge; and therefore where the servant pleaded " That plaintiff having struck his master in his presence, that he in his master's defence struck plaintiff." the plea was held to be ill on demurrer, for the assault on the master might be over, when the servant struck the plaintiff. Barfoot v. Reynolds. 2 Stra. 953.

* So in an action against husband and wife, the wife may plead that plaintiff was going to wound the husband, and that she *insultum fecit*, to defend him and prevent the plaintiff from beating him. *P. 394. Leward & ux. v. Bafely.

5th. " But in this or any other plea the wife cannot plead alone, the husband must always join." L. Raym. 62.

In assault and battery against husband and wife, he pleaded that his wife was assaulted, and that he in aid of and defence of her, assaulted the plaintiff, &c. She pleaded, *son-assault demesne*. There was a general replication to both pleas of *de injuria sua propria*, and damages awarded. And afterwards a repleader was awarded, for reason, that the *feme* had pleaded alone, which she could not do. Watson v. Thorpe & ux. Cro. Jac. 239.

6th. " A former recovery of damages in an action for the same offence is a good plea in bar."

" And if the plaintiff has once recovered damages for the assault and battery, he cannot afterwards recover " in

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“ in a new action, for any further mischief or injury arising from the same battery.”

Fetter v.
Beale.
Salk. 11.

As where after the plaintiff in this action had recovered damages for the battery, a piece was cut out of his skull, in consequence of the former wounding, for which he brought a new action, it was held not to lie. For the battery itself is the ground of the action, and the injury the measure of the damages, but here the ground of the action was gone by the first recovery.

*P. 395.
Yelv. 68.

So, if a battery has been committed by several, and a recovery had against one, such recovery may be pleaded in bar to an action brought against any of the others for the same battery. For plaintiff can receive but one recompence for the same injury.

Gray v.
Hart.
2 Salk. 517.

7. If defendant justifies an assault and battery under a writ to the sheriff, and warrant directed to him to arrest the plaintiff, he should set out from what court the writ issued, or it will be bad. Here he justified under a writ returnable in C. B. and it was held ill, for it might be a writ out of the K. B. or County Palatine, which cannot be returnable in the Common Pleas.

8. By statute 21 Jac. 1. c. 16, all actions of assault and battery must be sued within four years, and this statute must be pleaded in bar.”

Blackmore
v. Tidderly.
Salk. 422.

Therefore where to this action defendant pleaded by mistake *non culp. infra sex annos*; it was on demurrer, held to be a bad plea.

2 L. Raym.
1099. S. C.
Palmer v.
Wadbroke.
2 Stra. 876.

9. Defendant cannot plead double under the statute, the general issue not guilty, and a justification; for they are contradictory, since a justification must admit what the general issue denies.

Co. Litt.
282.

10. This being a transitory action in which the time or place are merely inducement, the place cannot be traversed without special cause of justification, which extends to some certain place; as if a constable of a town of another county arrests the body of a man that breaketh the peace there, he may traverse the county, but he must not rest there, but all other places, saying in the town whereof he is constable.

*P. 396.

* Note, by stat. 7 Jac. 1. c. 5. if trespass in assault or battery is brought against any justice of peace, constable, &c. for any thing in execution of their office, they may plead the general issue, and give the special matter in evidence.

3. Of the Evidence on the part of the Plaintiff.

Per Pratt J.
1 Stra. 68.
1 Sid. 325.

1. As plaintiff in this action may also prosecute the defendant by indictment for a breach of the peace. It is to be known that the plaintiff cannot give in evidence in the

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the action, *a conviction on an indictment for the same assault*: Rex v. Warden of the Fleet.
For it is a rule of evidence, that no verdict shall be given in evidence except where the parties have been the same, and Per Holt in one case the king is one of the parties, and in the other arg. Caf. the plaintiff: Nor is any thing to be admitted in evidence of K. B. 339. which both parties have not equal benefit, that is such as either party should be equally at liberty to give in evidence. in case it made for him.

2. "Plaintiff was in a case of assault allowed to give in evidence what was felony."

As where in assault and battery defendant gave in Westbrooke evidence, that he was married to the plaintiff, and to take v. Strut- away that evidence plaintiff was admitted to prove that she ville. I Stra. 79. had another husband living when she married the plaintiff.

3. In this case the memorandum was generally of Guy v. Kit- Michaelmas term, and *son-assault* being pleaded, the fact chener. was proved at a day * within the term. A case being made, 2 Stra. the court held it well enough, for the plaintiff need have 1271. *P. 397. given no evidence on this plea, unless to aggravate damages, and the court will not nonsuit him, because it is amendable by a new bill.

4. Of the Evidence on the part of the Defendant.

There is a difference to be observed between what may Downes v. be given in evidence on the issue of *son-assault demesne* and Skrymsher. on not guilty. If defendant pleads *son-assault demesne*, Brownl. 233. and plaintiff replies *de injuria sua propria*, &c. plaintiff shall not be allowed to give in evidence a battery at another day and place than that laid in the declaration. But upon not Litt. § 465. guilty pleaded, plaintiff may give in evidence an assault and battery at any time or place.

2. In an action by husband and wife for a battery of Dickinso v. the wife, on the general issue pleaded, defendant shall not Davis. be allowed to prove or go into evidence, that the woman is 1 Stra. 480. not wife to the plaintiff, it should be pleaded in abatement, and so plaintiff might meet the objection fairly.

5. Of the Verdict, Damages, and Costs.

It is previously to be observed, that in cases of very gross 1 Sid. 307. assault, in which it is apparent that the damages will Raym. 74. exceed 10*l*. the court or any judge of the court may give leave to the plaintiff to sue out a writ with a clause of *ac etiam billæ*, and hold the defendant to special bail.

* But if the writ is so sued out, and defendant held to *P. 398. bail, if the damages recovered exceed the sum in the *ac* Genbaldo v. *etiam*, the bail are not liable to any part. Here the *ac* Cognoni. *etiam* was 30*l*. and the verdict being for 100*l*. the bail were Salk. 102. held not liable.

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1st. OF THE VERDICT AND DAMAGES.

Litt. § 485.

1. In assault and battery if the jury find upon the plea of not guilty, the defendant guilty in another town, or at another day, than the plaintiff has laid, yet shall the plaintiff recover, for it is transitory.

2. As to the damages it is a general rule "That the plaintiff shall have but one recompence in damages, though the assault and battery be committed by several, and though his action be brought either joint or several."

Crane & Hill.
v. Hummerstone.
Cro. Jac. 118
Sir J. Heydor's Case.
11 Co. 6. 7.

As where in assault and battery against two, one pleaded *not guilty*, and the other *son-assault demesne*, and both issues were found for the plaintiff. It was held that there should be but single damages assessed: So where one defendant had pleaded specially, and plaintiff demurred, and had judgment on demurrer, it was adjudged that there should be but single damages assessed.

Rodney v. Strode.
Carth. 19.

Therefore where plaintiff declares jointly, the jury cannot sever the damages, so as to give greater against one than another. But if the jury find otherwise, the plaintiff may enter * a *noli prosequi* against all but one, and have judgment against him.

*P. 399.

"But in this as well as other actions of trespass against several, the jury may find some guilty and others not guilty."

Dare v. White & ux.
Show. 350.

And in the case of a battery against husband and wife, the jury may find the wife guilty, and the husband not guilty, and *vice versa*.

Cook v. Beal.
1 Ld. Raym. 176.

3. Where there has been a *mayhem*, or wounding, the court may upon *view encrease the damages*, even though a *mayhem* was not laid in the declaration; but under the following restriction, *viz.* 1. The judge who tried the cause at *Nisi Prius*, may not himself increase the damages, he ought to certify it by indorsing on the *posse*, what maim or wound was proved, unless he is a judge of the same court wherein the motion is made for increase of damages.

S. C.
Latch. 233.

2. The plaintiff must always be present in court when the motion is made for increase of damages.

S. C.
Style 245.
S. C.

3. The manner of wounding should have been stated in the declaration.

4. "Upon a motion to increase the damages *super visum vulneris*, it should be proved to be the *same wound* for which the damages were given."

Smallpiece v. Beckenham.
Mich. 27
Car. 2. C.B.
Bull. N.P. 21.

For where the maim in this case was the loss of an eye, the court ordered the defendant and the witnesses to appear and be examined, and several of the jury who tried the cause, and it appearing that no evidence had been given at the trial of the loss of an eye, the court would not increase the damages, for new evidence should not be admitted.

5. But

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5. But where the judge who tries the case certifies or declares, that he is satisfied with the verdict, the court will not increase the damages. Brown v. Seymour. 1 Will. 5.

6. In this case on a view of the party, and examination of the surgeon, *ore tenus*, in court, the damages were increased from 11*l.* 14*s.* to 50*l.* Burton v. Baynes. 1 Barnes, 106.

O F C O S T S.

1. By statute 22 and 23 *Car. 2. c. 9.* "In actions of assault and battery, if the damages recovered are under forty shillings, the plaintiff shall have no more costs than damages, unless the judge shall certify that the assault and battery were sufficiently proved; and if any more costs are given, the judgment shall be void, and the defendant be acquitted, and have his action against the plaintiff for such vexatious suit, and recover his costs and damages in any court of record."

But 1. "The action must be solely an action of assault and battery to deprive plaintiff of his costs, for if it is coupled with any other offence which does not require a certificate, and defendant is found guilty, *that shall * take it out of the statute, and give plaintiff full costs.*" *P.401.

For where in trespass for an assault and battery, breaking a standard roller, and taking and carrying away divers goods and chattels; the defendant was found guilty of all, except the taking and carrying away, and damages found under forty shillings. On the question arising concerning the costs, the court held, that though the assault and battery alone might require a certificate, yet that part concerning the breaking the standard and roller, not requiring it, and both making one cause of action, that plaintiff should have his full costs. Milbourne v. Read. Trin. 17, 18 G. 2. C. B. quot. 3. Will. 322.

2. "But this matter to entitle the plaintiff to full costs, where the damages are under forty shillings, must be charged and found as a substantive issue, and independent of the assault; for where it is merely part or consequence of the assault and battery, there shall not be full costs."

For where the action was for assaulting the plaintiff and tearing his coat, which the jury found to be a consequence of the battery, and damages under forty shillings, plaintiff had no more costs than damages. Cotteril v. Tolly. Pasch. 27 G. 3. B. R. Term. Rep. 655.

So where the declaration was, that the defendant assaulted the plaintiff, pushed him down on the ground, the ground being covered with water, whereby his coat was wet and spoiled, and he became sick and weak. After verdict for the plaintiff, and damages of forty shillings, there being no certificate, the * court held the plaintiff not entitled to full costs, *for the spoiling of his coat was not a distinct thing from the assault, but an injury arising from the original cause of action, and a consequence of it.* Hamson v. Adhead. Trin 17 G. 2. B. R. Bull. N. P. 329. *P.402.

So

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Clerk v.
Othery.
1 Stra. 624.

So where the action was assault and battery, with a *nec non insultum fecit* on plaintiff's horse and damages under 40s. the special matter as to the horse was held not to entitle the plaintiff to full costs, it being part of the same offence.

2. "Though another offence be joined as the consequence of the assault and battery, if that is an offence in itself actionable, though the damages are less than 40s.; yet the plaintiff shall have his full costs."

1 Stra. 192.

As in trespass for an assault and battery of plaintiff's wife or servant *per quod consortium* or *servitium amisit*, and damages under 40s.; yet shall plaintiff have his full costs; for the special damage is the gist of the action, and of itself actionable.

Richards v.
Turner.
Trin. 6 G.
1. C. B.
Bull. N. P.
330.

3. If defendant *justifies*, he admits the battery, and in such case no certificate is necessary to entitle the plaintiff to full costs, if the damages are under 40s.; for the judge could only certify that the assault and battery was well proved, which defendant admits. But if defendant justifies, and plaintiff makes a new assignment, to which defendant pleads not guilty, if the damages are under 40s. plaintiff * must have a certificate to give him full costs.

*P. 403.
3 Will. 326.

4. The certificate under stat. 22 & 23 Car. 2. must be that the assault *and battery* was well proved; not the assault alone.

And by statute 8 & 9 Will. 3. c. 10, 4. "If the judge shall certify that the trespass for which the action was brought, was wilful and malicious, though the damages were under 40s.; yet shall the plaintiff have his full costs."

3 Will. 326.

And where there was an assault only, and no battery, but that appeared to be *wilful and malicious*, (as drawing a sword and attempting to stab the plaintiff) Lord Chief Justice Willes said that he would certify under this statute, in order to give plaintiff his full costs where the damages were under 40s.

As to Costs to Defendant.

By stat. 8 & 9 W. 3. c. 11. "Where there are several defendants to an action of assault and battery, and one or more shall be acquitted, the person so acquitted shall be intitled to his full costs, unless the judge certifies that there was reasonable ground for making him a defendant."

2. By stat. 7 Jac. 1. c. 5. "In actions of assault, battery, and false imprisonment, brought against *justices of peace, mayors, bailiffs, or constables*; for any thing done by virtue of their offices, if they have a verdict, or the plaintiff * discontinue, or be non-suit, they shall have double costs."

*P. 404.

For constructions on this statute, *vid. post. ch. Trespas.*

And by st. 21 Jac. 1. c. 12. the provisions of the last act are extended to *church-wardens and overseers of the poor*.

CHAPTER

FALSE IMPRISONMENT.

* CHAPTER V.

*P. 405.

THE ACTION OF FALSE IMPRISONMENT.

THE offence of *False Imprisonment* consists in the unlawful detention of the person without any legal authority. It is therefore necessary to constitute this offence, or determine what detention is unlawful.

Every detention of the person, as by confinement either ^{2 Inst. 589.} in a prison or private house, in the stocks, or by forcibly detaining one in the street, is an imprisonment.

I shall therefore, 1. Consider what arrests or detentions are illegal, and as such will support this action; 2. What are legal, and so afford a good justification to the person sued in this action for the arrest or detention; 3. The pleadings and evidence on the part of the plaintiff and defendant; and, 4. The verdict and damages.

But 'tis previously to be observed, that no action of false imprisonment lies against *a judge of a court of record*, for any act done by him in execution of his office, nor for any mistake of judgment: Neither are his acts or *decisions ^{Groenvelt v. Burwell. Salk. 396.} *P. 406. traversable. This was decided in this action brought against the officers and censors of the college of physicians, who having a power to examine and punish by fine and imprisonment, were held to be a court of record.

1st. WHAT ARRESTS or DETENTIONS are ILLEGAL.

Arrests are illegal, 1. Considered with reference to the person; 2. To the writ and process; 3. To the court from whence it issues; 4. In cases reducible to no certain head.

1. Of Illegal Arrests with reference to the Person.

1. As an executor or administrator can only be arrested ^{Barker Exe-} for a debt of testator's or intestate's, *on a suggestion of a de-* ^{cutor v.} *vassavit*: where no such suggestion was made, and plain- ^{Braham &} *tiff* who had administered to her husband was arrested for ^{Norwood.} a debt due by him in his life-time, this action was ad- ^{3 Will. 368.} judged to lie against the *plaintiff* in that action, and the *attorney* in it who had sued out the writ. It was contested in this case, that the action should not lie against the attorney; but the court held him liable, the offence being a trespass, in which all are principals.

"But a distinction is to be observed between arrests of persons *not liable to arrests*, and arrests of persons who are liable in general, but *have a particular privilege or exemption*;

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***P.407.** “*emption*; * for the arrest of these last is not illegal, nor subjects the party to this action.”

Cameron v. Lightfoot. 2 Black. Rep 1190. As where the plaintiff was a *witness* in a cause at *Westminster*, and was arrested by the defendant in returning from thence, false imprisonment was held not to lie; for the exemption from arrests is a *privilege* not of the person but of the court, and the writ is not void, for the suit continues, though the party may be discharged on motion.

Tarlton v. Fisher. Dougl 646. Countess of Rutland's Case. 6 Co. 52. b. So in the case of other privileged persons, as *peers*, *certificated bankrupts*, *insolvent debtors*, or such like, no action of false imprisonment lies for arresting them. So also but in such cases against an officer, the action was held clearly not to lie as against him; for he was at all events justified by the writ, which was compulsory.

Wilson v. Tucker. Salk. 78. But in case of an arrest on a *Sunday*, the process being declared by the statute to be *void*, this action will lie.

2. “In actions against *husband* and *wife*, the arrest is “only legal, if made in pursuance of these cases.”

Bardolph v. Perry & ux. Moor 701. 1. If the action is against the husband and wife, *for a debt of the wife, dum sola*, and judgment for the plaintiff, the *capias* shall issue to take the bodies of *both* husband and wife.

Harrison v. Bearcliffe. 2 Stra. 1272. But this is the case only in arrest on *final process*; for in the case of *mesne process*, where both were arrested for a debt of the wife's ** dum sola*, she was discharged and he retained till he found bail for both.

***P.408.** Roberts v. Andrews. 2 Black Rep 720. and Case ibid. So where an interlocutory judgment was signed against both, and a *sci. fa.* issues against the bail, who surrendered them into custody *before execution*, the wife was discharged.

Doyley v. White. Cro Jac. 323. 2. But if the action had been originally commenced against the wife *when sole*, and pending the suit she marries, and the plaintiff has judgment, the *capias* shall issue against the *wife only*, and not against the husband.

Anon. Cro. Car. 513. 3. But on all judgments obtained on the wife's contracts or for her torts committed *during coverture*, the writ shall go against the *husband alone*.

3. “Where a writ issues against any one, and the officer “mistakes the defendant, and executes the writ, by *arresting a wrong person*, the person so arrested may maintain “this action, even though he was himself accessory to such “false arrest.”

Coot v. Lightworth. Moor 457. As where, in false imprisonment, defendant justified, that he having a warrant against *J. S.* asked of the plaintiff his name, who answering *J. S.* which was not his true name, defendant arrested him. On demurrer, this plea was held to be bad; for the officer must take the right person at his peril.

Thurbane's Case. Hard. 323. So where a commission of rebellion issued against one *Thurbane*, and a person of the name of *Green* appeared • before

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* before the commissioners, and affirmed himself to be *Thurbane*, and being apprehended, he resisted and snatched the commission and tore it in pieces. For this on an attachment it was ruled by Chief Baron *Hale*, that though he *had falsely affirmed himself to be Thurbane*, yet that would not excuse the commissioners from false imprisonment, for they had no warrant to arrest *him*. * P. 409.

2. The second case of illegal arrests, is *with reference to the writ or other process.*

1. "In the case of *void process.*"

Plaintiff, in this action, was arrested by the now defendant, by a writ of *capias ad respondendum, returnable the term next but one to the teste*, (it was of *Trinity term*, and returnable in the *Hilary* following); this writ being irregular and void; (as every writ of *mesne process* should be returnable *the next term to the teste*, for otherwise the defendant might be imprisoned for a long time;) on this case false imprisonment was adjudged to lie against the now defendant, who was plaintiff in the former action; though this writ had been a good justification to the officer. Parsons v. Lloyd. 3 Will. 341. 2 Black. Rep. 845. S. C.

2. In the case of *irregular process.*

As where defendant in a former action (the plaintiff in this) had been arrested by a *ca. sa.* founded on a judgment, which was afterwards set aside for irregularity; it was adjudged, that he might well maintain this action for * the arrest. And a distinction was taken between process irregular and erroneous. "If erroneous, it is the act of the court, and the party shall not suffer; but if it is irregular, it proceeds from the act of the party or his attorney, and an action will lie on it." Philips v. Biron. 1 Stra. 509. * P. 410.

And the *process of arrest* has been held *irregular* and void in the following cases.

1. "Where filled up without proper authority."

1. As where *Burslem* the plaintiff being indebted to one *Jones*, *Jones's* attorney sued out a writ against him, but the under-sheriff left a blank in the writ for the name of a bailiff, and *Jones's* attorney inserted the name of *Fern* the defendant, who arrested the plaintiff. False imprisonment was adjudged to lie against *Fern*, for the arrest was illegal, as the under-sheriff should have inserted the name in the writ of some sheriff's officer; for by leaving it to the attorney, he might nominate persons of no property, or infamous characters, who might be guilty of oppression, and have nothing to answer to the party injured, the arrest should be by the officers of the sheriff, who have given security to him. Burslem v. Fern. 2 Will. 47.

2dly, "Where it has issued informally."

2. Defendant justified an arrest of the plaintiff, by producing out of the Vice-Chancellor's court of *Oxford*, and shewed Smith v. Bouchier. 2 Stra. 993.

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***P.411.** shewed that by the * custom a plaintiff making oath of his cause of action, and that *he believes* that defendant will abscond, may have a warrant to arrest him and hold him till security given, and then shews, that he made such oath of his cause of action, and that *he suspected* that the defendant would run away, upon which he had a warrant from the Vice-Chancellor, and arrested the now plaintiff. Upon demurrer, the court held the custom not to be pursued, for the custom is to swear to the *belief* of the defendant's intention to abscond, and here the plaintiff only swore to his *suspicion*, which is not the same; for that may be a ground of suspicion which will not induce a belief, and the arrest being therefore made under the custom was illegal, and that so the party might have this action of false imprisonment.

Johns v.
Smith.
Cro. Jac. 314

3. When the process was *not returnable on a day certain*, under which defendant had been arrested, the writ was adjudged to be void, and this action to lie for the arrest.

2 Wilf. 226.

4. Where defendant was arrested, and *the affidavit to hold him to bail was not sufficiently positive*; so that he was intitled to be discharged. *Clive and Gould*, Justices, were of opinion that this action lay against the plaintiff, or filazer, for such arrest.

Allen v.
Allen.
2 Black. Rep
694.
Tyler v.
Johnson.
quot. 2 Black
Rep. 834.
S. P.

5. Where a judgment is of one county, the defendant cannot be arrested in another, without a *testatum capias*, or suggestion that the defendant was commorant in such other county. In such case, therefore, where defendant was so *arrested, without any *testatum* or suggestion, this action was held to lie.

3. The third species of illegal arrests is
***P.412.** *With reference to the Court or Magistrate who issues the Process.*

This is 1. By issuing process *where it has no jurisdiction*;
2. *Where it exceeds or does not pursue its jurisdiction*;
3. *Where the subsequent proceedings are irregular.*

Higginson v.
Martyn &
Hadley.
M. 28 Car. 2.
Bull. N. P. 83

If a person is arrested by process out of an inferior court *not having jurisdiction*, he may have this action against the plaintiff in that action, and his having pleaded to that action in the inferior court, shall not be such an admission of the jurisdiction, as shall bar him of his action for the false imprisonment; for every one should know the extents of that court's jurisdiction, to which he applies for redress.

2. "Where the inferior court *exceeds, or does not pursue its jurisdiction*, the party imprisoned under its process may maintain this action.

"And wherever an authority to commit is given by statute, it must be strictly pursued." As in the case of *Smith* and *Boucher*, ante.

* So

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* So where, by stat. 14 H. 8. all persons are forbid to *P.413.
 practise physic in London, or within seven miles of it, unless Dr. Bon-
 allowed by the president and censors of the college of physi- ham's Case.
 cians; and four *censors* are appointed yearly, who may 11 Co. 114.
punish by fine and imprisonment, persons offending in practice,
non bene utendo et exequendo facultate medicinæ. Plaintiff
 practised in London without being so allowed, and being
 summoned, he said, *he would practise without their permis-*
sion; for which, by warrant from the president and censors,
 he was committed to the counter, and on bringing this action
 for false imprisonment, it was held well to lie, 1. Because
 the act appoints the *censors* to fine and imprison, here it has
 been done by the president and censors; 2. The offence for
 which the party is to be committed, is *pro non bene exequendo*
facultate medicinæ; here the *committat* is for saying, that *he*
would practise without their permission: so that the power of
 committing not being strictly pursued, the persons com-
 mitting were held to be trespassers, and that the action lay.

"So in the case of *Commissioners of Bankrupt*."

This action was adjudged to lie against the defendants, Dyer v. Mis-
 who were commissioners of bankrupt, for committing the *ling*.
 plaintiff (whom they suspected of secreting part of the 2 Black. Re.
 bankrupt's effects) for not appearing on the *first summons*. 1035.
 The statute of 1 Jac. 1. c. 15. enacting, "That in such
 "case a summons shall first go to the party to appear, and
 "in default, or neglect, * a warrant or second summons, and
 "if brought in on the warrant, he refuses to be examined, *P.414.
 "or on a second summons neglects to come, then, and not
 "before, the commissioners have power to commit;" and
 here having been committed on the *first summons*, the im-
 prisonment was contrary to law.

And this action lies against commissioners of bankrupt for Miller v.
 any commitment not warranted by their power, as for not Seare & al.
 answering a question, which question appears to be improper, 2 Black. Re.
 or where they do not acquiesce in a sufficient answer, but 1141.
 commit the party; so if the time committed for is improper.
 3d. Where the court or magistrate has power, but the
proceedings are irregular.

1. Defendant was committed by the sessions for not taking Crawley's
 on himself the office of constable of a place of which he Case.
 denied that he was an inhabitant. This commitment was Cro Car.
 adjudged unlawful, for he should *first have been indicted* 5691.
 for refusing to undertake the office, and if he had been found
 on the indictment to be an inhabitant of the place, he should
 have been fined, and committed only for non-payment of the
 fine.

So where the defendant was a justice of peace, and con- Hill v. Bate-
 victed the plaintiff for destroying the game, and though it man.

was 1 Stra. 710.

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was proved, *that the plaintiff had effects sufficient to answer the conviction* if distrained, yet the defendant *sent him immediately to Bridewell*, without endeavouring * to levy the penalty upon his goods. This action was held well to lie against the justice for such irregular commitment.

***P.415.** *Smith v. Sibson.* 1 Will. 153. So where plaintiff was convicted in a penalty for harbouring run goods contrary to statute of Geo. 1. in a penalty of 13*l.* which he offered to pay, but was kept in custody till he paid a further sum of 5*l.* 4*s.* for fees, which could not by law be demanded. This action was adjudged to lie for such detention, when he was entitled to a discharge.

2. "So though the original arrest might be warrantable, yet for any subsequent oppression or cruelty this action lies." *Wall v. M^r Namara.* Term Rep. 536. As where defendant was governor of *Senegambia*, and the plaintiff being an officer, from the dangerous state of his health, had quitted his post without leave, for which he was justly put into confinement; but it appearing that *circumstances of unnecessary and wanton cruelty had been practised*, as confining him for a long time in a dungeon, without the benefit of fresh air when dangerously ill, he recovered considerable damages in this action.

For other cases of arrests *vid.* action of trespass on the case.
4th. The fourth kind of illegal imprisonment consists of

***P.416.** * *Cases reducible to no certain Head.*

As 1. The mayor and burgesses of *St. Albans* made a rate for building a court-house, to be assessed on the inhabitants at large, and made a *bye-law thereon*, "That any one refusing to pay such rate should be imprisoned." Under this bye-law the plaintiff was taken and imprisoned, and this action was adjudged to lie for such imprisonment. For no bye-law can create such a power, it is contrary to *Magna Charta*, which declares, "That *nullus liber homo capietur aut imprisonetur nisi per iudicium parium suorum.*"

2. So where a person was arrested, and the person at whose suit he had been arrested *ordered the sheriff to discharge him*, and released him of the action, notwithstanding which the sheriff detained him, this action was adjudged to lie against the sheriff. So where there was a *superseas* sent to the sheriff.

3. "Where any false imprisonment has been done by the influence or procurement of another, this action shall lie."

As where defendant, who was an *East India* governor, prevailed on the *Nabob* to imprison the plaintiff. This action was adjudged to lie against him.

So it was for any injury committed in a foreign country; as in this case, against the governor of *Minorca* by an inhabitant, whom he had falsely imprisoned.

" 4. By

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* 4. By stat. 5 H. 4. c. 20. justices of peace shall imprison no person but in the common gaol, saving the rights of lords, who have gaols in their franchises. Quære, if false imprisonment would not lie on this statute, if a justice of peace imprisons a person elsewhere ?

I shall now consider

2. WHAT ARRESTS OR DETENTIONS ARE LEGAL, and so afford a good justification to the party sued.

1. "The first is the case of arrests under the process of some court of justice having cognizance of the cause, which process has regularly issued." ^{3 Black. Com. 127.}

But a distinction is to be observed in the case of officers and private persons. If the action is against the *sheriff* for the arrest, he shall *justify* sufficiently, by *shewing the writ*. So it is in the case of his bailiff or officer, with this difference, that the sheriff *must shew the writ returned*, if returnable; which the bailiff need not, as it is not in his power. But if the action is against the plaintiff in the first action or a mere stranger, they cannot justify unless they shew a judgment as well as execution; for the judgment might have been reversed. ^{Britton v. Cole. Salk. 408. Countess of Rutland's Case. 6 Co. 52. 1.}

2. "A second good justification under a legal arrest is, if made by an officer having authority to arrest, or under such officers or magistrate's warrant under hand and seal, and expressing the cause of the commitment." ^{3 Black. Com. 127.} *P. 418.

But "it must appear that the warrant was legal; that is, issued in a case of which the magistrate had cognizance, for if not, the warrant shall not justify the officer acting under it." ^{2 Inst. 46.}

As where a justice of the peace issued his warrant to the defendant to *arrest the plaintiff*, on a complaint for non-payment of servants wages, and defendant did arrest the plaintiff; this action was adjudged to lie against him, for a justice of peace has no such power to grant such a warrant to apprehend the party complained of, he can only issue a *summons*. It was therefore an illegal warrant, and no justification to defendant. ^{Shergold v. Holloway. 2 Stra. 1002.}

So an officer cannot justify an arrest and imprisonment for non-payment of taxes, under the general printed warrant, which such collectors have signed by two justices. But he ought to have a special warrant. ^{Masters v. Butcher. 1 Ld. Raym. 740.}

So a magistrate may commit for any contempt shewn to him, but it must be while in execution of his office. Therefore where in this action defendant justified that he being mayor of the corporation of *W.* plaintiff said, "He was a fool," wherefore he committed him. It was held ill for not shewing that he was in his seat or exercising his office. ^{Anon. Moor, 247.}

3d. A third good cause of arrest is such as is warranted by the necessity of the thing: As arresting a felon by a private person; ^{3 Black. Com. 127.} Foster's Crown Law.

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*P.419. person; * impressing failors in the time of war; apprehend-
Stat. 7 G. ing waggoners for offences or misbehaviour on the highway,
3. 42. and such like causes.

Rex v. 4. *Secretaries of State* may commit for suspicion of treason,
Kendal & as conservators of the peace did at common law, and it is
Roe. 1 Salk. incident to their office. And a commitment to a messenger is
347. good.

Entick v. But they have no power to issue a *general warrant* to arrest
Carring- the person, or seize the papers on a general information.

ton. 2 5. "*Commanding officers in the service of the army or navy*
Will. 275. "have a power of putting their inferior officers under an ar-
rest, but it must be done on good grounds, and not oppres-
sively."

Swinton v. As where defendant was captain of the *Trident* man of
Molloy. war, and put plaintiff, who was the purser into confinement;
Term. Rep. he kept him there for three days, after which he liberated
537. him, without any charge or court-martial. Plaintiff re-
covered for the imprisonment.

Le Caux v. 6. False imprisonment will not lie for the taking and de-
Eden. taining the mariners of a ship, which has been captured as a
Doug. prize, though the Court of Admiralty afterwards find her not
592. to be a lawful prize. For the Court of Admiralty possesses
an exclusive jurisdiction not of prize only, but of every mat-
ter dependent on it, which this is, as the mariners must be
brought in with the vessel, and that court can give damages
for the injury, and detention to the individuals who are in-
jured.

*P.420. * 4. OF THE PLEADINGS AND EVIDENCE

1st. On the Part of the PLAINTIFF.

I find no cases of consequence to this head except the fol-
lowing, viz. 1. That no new matter foreign to the issue is
admissible in evidence, under the general replication of *de*
injuria sua propria, of any fact, which is not contained in the
plea, for those alone are traversed by that replication.

Sayre v. For where to an action of false imprisonment defendant
Ld. Roch- pleaded a justification of the arresting the plaintiff, under a
ford. 2 information for treasonable practices, made to him as secre-
Black. Rep. tary of state, for which offence he had been admitted to bail
1155. by the chief justice of the *King's-Bench*. Plaintiff replied the
general replication, of *de injuria sua propria absq. tali causa*.
It was adjudged that under this replication, that plaintiff
could not give in evidence a *tender and refusal of bail*, for
it was not contained in the issue.

Hillyfield 2. Defendant justified, that he had arrested plaintiff by
v. Stany- *latitat* for 20*l.* which he owed him; plaintiff replied, and
ford Mich. traversed that he owed so much money, and a replender was
25 Car. 2. awarded; for the debt is but inducement, which should not
Bull. N.P. be traversed.
23.

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* 2. Of the Pleadings and Evidence on the Part of *P.421. the DEFENDANT.

1. Where this action is brought jointly against the plaintiff in the former action and the officer they may sever in their defence, for the writ would be a good justification to the officer; but if the officer joins the plaintiff in the same plea, he waives the benefit he may have himself, and if the plea is bad as a justification for the other, judgment shall also go against him. Smith v. Boucher.
2 Stra. 993.
2 Ref.
Philips v. Biron.
1 Stra. 509.
2 Ref.

And so if they join in the plea, and it is bad for the officer, it shall be so likewise for the other party; as here where he did not shew the process returned, under which he justified. Middleton v. Price.
1 Willf. 17.

2. "Where defendant justifies under process of a court of limited jurisdiction, the plea should shew, *that the cause was properly subject to such jurisdiction.*"

As where in this action defendant justified, under a pre-scription in the *Marshalsea Court to hold plea of all causes within the verge*, and under a *capias* returnable at the next court, under which plaintiff had been arrested. This action was held to lie for such arrest, for reason that the process was ill awarded, and the arrest unlawful: 1. Because it did not appear that the parties to the action were of the household, between whom only the court has jurisdiction; 2dly, Because the process was *not returnable* * on a day certain, but at the next court. *Ante. 411.* Johns v. Smith.
Cro. Jac.
314.
*P.422.

So where defendant justified, under an order of a court of record in London, as a serjeant at mace, to arrest the plaintiff *pro quodam contemptu*, for not paying 20s. to B. G. which he owed him. On demurrer the plea was held to be bad, for to imprison a man *pro quodam contemptu*, is too general, and by this plea it does not appear that the court had jurisdiction, and the officer is only to obey the order of the court, in matters of which it hath jurisdiction. Dye v. Olive.
March 117.

2. "Where defendant justifies in like manner, under process of an inferior court, and a special authority to imprison, the plea should shew that *that authority was strictly pursued.*"

For where, in trespass and false imprisonment, defendant justified under an order of the *Court of Conscience* in London, directed to him to arrest the plaintiff, and carry him to the Counter, and imprison him till he paid 9s. 6d. *virtute cujus*, he took him and detained him. On demurrer, the plea was adjudged to be bad; for the order was, to imprison him in the Counter, which his plea should have shewn, as he confesses he took and detained him. Swinstead v. Lyddal.
Salk. 408.

3. Where an officer, or other person, justifies under process, which is returnable; he must in his plea shew that it was returned, or the plea will be bad. Middleton v. Price.
1 Willf. 17.
2 Stra.
1184. S. C.

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*P. 423. * " And note, That this action being in its nature trans-
Co. Litt. tory, the place laid in the declaration is not traversable,
282. " except the justification extends only to a particular place."
Smith v. For where, to false imprisonment in *Middlesex*, the defen-
Hellier. dant justified that *Lynne* was an ancient village, and that it
Cro. Eliz. *usitatum fuit* to chuse a mayor annually, who was keeper of
167. the gaol, and that plaintiff was committed to gaol on a plaint
entered in the court there, *absque hoc that he was guilty in*
Middlesex. The justification being local, the traverse was
held to be good.

4. The *statute of limitations* is a good plea in this action, as
to which it is enacted by stat. 21 *Jac. c. 16*. " That all ac-
tions for assault and battery, or imprisonment, shall be
brought within *four years* after the offence committed, or
they shall be bar'd."

Coventry If the imprisonment is laid for a continued length of time,
v. Apsley. as here from 32 *Car. 2.* till the 3d of *April, 4 Jac. 2.* defen-
Salk. 420. dant may divide the time, and plead the statute of limitations
as to part and not guilty, or any other plea to the rest; and
in such case plaintiff should not demur, but plead that the
duress was continued.

" In the case of *justices of peace*, or *constables* acting under
their warrants, another limitation is made by statute 24
Geo. 2. c. 44. which enacts, that actions against them

*P. 424. " * shall be commenced within *six months* after the offence
committed, or the plaintiff shall be bar'd."

Pickersgill If a man be imprisoned by a justice's warrant, the first day
v. Palmer. of *January*, and kept in prison till the first day of *February*,
Trin. 1 G. if the action is commenced within six months after the first
3. C. B. day of *February*, it will be commenced in time; for the
Bull. N. P. whole imprisonment is one entire trespass.

24. With respect to officers acting in virtue of their office,
special provision is made by statute to this effect. By statute
21 *Jac. 1. c. 12.* it is enacted, " That Justices of the peace,
mayors, bailiffs, church-wardens, and overseers of the
poor, constables, and other peace-officers, may plead the
general issue, and give the special matter in evidence. Like-
wise, that any action brought against them shall be laid in
the proper county; and if upon not guilty pleaded, it shall
appear that the fact was done in another county, the jury
shall find defendant not guilty."

And by statute 24 *Geo. 2. c. 44.* it is further enacted,
" That no writ shall be sued out against a justice of peace,
for what he shall do in execution of his office, till notice in
writing of such intended writ shall be delivered to him, or
left at his place of usual abode, at least a month before,
and the justice may tender amends; and in case the
same

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"same is not accepted, he may plead such * tender in bar *P.425.
 "of the action, together with the plea of not guilty, and
 "any other plea, by leave of the court; and if upon issue
 "join'd the jury shall think the amends so tendered suffi-
 "cient, they shall find a verdict for the defendant.

2. "No action shall be brought against any constable, or
 "any other person acting by his order for any thing done in
 "obedience of a justice's warrant, until demand made of
 "the perusal and copy of such warrant, and the same has
 "been refused for the space of six days; and in case the
 "warrant has been shewn, and a copy taken, and after-
 "wards an action brought against the constable, without
 "making the justice a defendant, the jury shall, on produc-
 "ing the warrant, find a verdict for the defendant, not-
 "withstanding any defect of jurisdiction in the justice.

"And if the action be brought jointly against the consta-
 "ble and the justice, upon producing the warrant, the jury
 "shall in like manner find for the constable.

"And if the jury find against the justice, the plaintiff shall
 "recover from him the costs he has to pay the constable;
 "with a proviso, that if the judge certifies that the injury
 "was wilfully and maliciously committed, the plaintiff shall
 "be intitled to *double costs*."

* The several constructions on this statute are :

*P.426.

1. *As to Justices of Peace.*

1. If the justice pleads tender of amends under this sta-
 "ture, the plaintiff may have a rule for the defendant to bring
 "the money into court, for the plaintiff to take the same, on
 "his discontinuing the action.

Laurence
 v. Cox.
 Hil. 33 G.
 2. B. R.
 Bull. N.P.
 24.

2. Though the justice has omitted to tender amends, yet
 "he may have a rule to pay a sum of money into court as
 "amends; but it must appear before this is allowed, that the
 "action is brought against the justice, *for something done as a*
justice in execution of his office. In this case the motion was
 "to that effect, and the court granted a week's time to plead,
 "in which time it appearing from the plaintiff's notice of ac-
 "tion, that the defendant was sued as a justice of peace, the
 "court made the rule absolute as above.

Calbourn
 v. Ball. 2
 Black Rep.
 859.

3. If the action is brought for an illegal commitment, or
 "any other unlawful act against the justice of peace, he is
 "obliged to shew the regularity of his proceedings, and the
 "information, &c. laid before him, upon which his proceed-
 "ings or convictions were founded, must be produced and
 "proved in court.

Hill v.
 Bateman
 1 Stra. 710.
 2 Ref.

4. A *secretary of state* is not a justice of peace, nor his
 "messengers constables, within the stat. 24. Geo. 2.

Entick v.
 Carrington.
 2
 Willf. 275.

2. As

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*P. 427.

* 2. *As to Inferior Officers.*

1. "The privileges given to constables and inferior officers, under these acts, is confined to cases in which they are acting in execution of their offices.

Anon. 1
Stra. 446.

For where the constable and another quarrelled, and the constable beat the other, this happened at *Dover*, and the action was brought in *Middlesex*, when the constable insisted the action should be brought in the proper county, by stat. 21 Jac.; but the objection was over-ruled, for that statute is confined to cases in which the constable is acting in execution of his office, and this was a private quarrel.

Money v.
Leach.
3 Burr.
1742.

2. The protection afforded to the constable or inferior officer under the statute, is only while acting in obedience to the justice's warrant: Therefore the defendant must always shew, that he did so act: And where the justice cannot be liable, the officer is not within the protection of the act; therefore 'tis no justification, if directed to him to take up one person, and he takes up another, for such is not in obedience of his warrant.

Nutting v.
Jackson.
Pasc. 13 G.

3. An overseer of the poor, who distrains for a poor's rate, under a justice's warrant, is an officer, within the protection of the act.

3. B. R.
Bull. N. P.
24.

4. "The act only extends to actions brought against officers for torts committed by them in the execution of their office, not for actions of another nature."

*P. 428.
Feltham v.
Terry.
Pasc. 13 G.
3. B. R.
Bull. N. P.
24.

* For where the action was *assumpsit* for money had and received, to recover back from the officer the money levied by him on a conviction which had been quashed, it was adjudged that a demand of the copy of the warrant under the statute was not necessary.

7. OF THE VERDICT AND DAMAGES.

"The jury can only give damages in this action to the time of the action brought."

Bonsfield
v. Lee. 1 L.
Raym. 329.

For where it was for false imprisonment for four months, from the 1st of *October*, and damages entire, and the declaration was of *Michaelmas* term, and so damages were given for part of the time after the action commenced; judgment was arrested.

Webb v.
Turner. 2
Stra. 1095.

But where the imprisonment was so laid, viz. for twenty-five weeks, from the 18th of *October*, and the declaration was of *Michaelmas* term, and verdict for plaintiff; it was moved in arrest of judgment, that the action was brought too soon, and it appeared that damages had been given for an imprisonment long after the action had been depending: but it was resolved that the *continuando* being laid under a *sciz.* would not vitiate what was properly laid in point of time, and plaintiff had judgment.

2. How

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2. How far (when this action is brought jointly) the jury may sever in the damages, * *vid. ch. Trespass*, under the head * P.429. *verdict*, the cases there applying here.

By statute 5 Geo. 13. all writs of error wherein there shall be a variance from the original record, or other defect, shall be amended.

Therefore, where an action of false imprisonment was *Verelst* & brought against *Verelst* and Smith, but *Verelst only was found* Smith v. *guilty*, by mistake, a writ of error was brought in the name *Rafael*. of *both*, and the court allowed it to be amended, by striking *Cowp* 425. out the name of the defendant below, who had been acquitted.

For costs to defendant, *vid. Action of Assault*, the law being the same.

CHAPTER VI.

* THE ACTION OF ADULTERY. * P.430.

THE ground of this action is the injury done to the husband, by alienating the affections of his wife, destroying the comforts arising from her company and that of her children, and imposing on him a spurious issue.

The principal matters to be considered in this action are :

1. The evidence necessary to maintain it ;
2. The damages ;
3. The pleadings and costs.

1. Of the EVIDENCE.

1. " Plaintiff must bring proof of the *actual solemnization* of a marriage, nothing shall supply its place ; cohabitation or reputation are not sufficient, nor any collateral proof whatever."

As where the plaintiff, in this case, proved articles made *Morris v.* after marriage with his wife, for the settling of the wife's *Miller.* estate, with the privity of the relations on both sides, cohabitation, name, and reputation ; he proved further, that the defendant, on being asked where *Mrs. Morris* was, answered, in the next room, * she being there with him : So that he had confessed that he had committed adultery with the plaintiff's wife, which it was contended was an admission of the marriage ; but it appearing that the marriage had in fact been celebrated in *Mayfair* chapel, but the register or book could

4 Burr.
2057.

* P.431.

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could not be admitted in evidence (stat. 26 Geo. 2. c. 3. § 14.) the minister who had married them having been transported, and the clerk being dead; for want of proof of an actual marriage, the plaintiff was non-suited.

Bull. N. P. 27. But proof of the marriage, either by a copy of the register of the church where the ceremony was performed, or by the testimony of one who was present at the ceremony will be sufficient.

Birt v. Barlow. Dougl. 162. And the copy of the register is of itself sufficient evidence of the marriage, *without proving the identity of the parties*; for marriage-registers are as records.

Woolston v. Scot. Per Dennison Just. at Thetford 1753. Bull. N. P. 28. So it is not necessary to prove a *marriage according to the ceremony of the Church of England*. It is sufficient if the plaintiff is of any religious sect, to prove a marriage according to the rites and ceremonies of that sect, as *Jews, Quakers, &c.*

+ Baker v. Morley. G. Hall. 1739. Bull. N. P. 28. † 2. The confession of the wife will be no proof against the defendant; but a discourse between her and the defendant may be proved: So letters written to her by the defendant may be read as evidence against him, though * her letters to him will be no evidence for him.

* P. 432.

2. Of the D A M A G E S.

Bull. N. P. 27. 1. The injury in the case of adultery being great, the damages are generally considerable; but they depend upon circumstances, that is, they are increased or diminished from the consideration of the rank and quality of the plaintiff: so from the peculiar turpitude of the case, as if the defendant was the friend, relation, or dependent of the plaintiff: so if it appear'd that the plaintiff and his wife lived happily before that transaction and acquaintance with the defendant: so that the wife had always borne a good character till then: so that there was a settlement and provision for the children of the marriage: All these go in aggravation of the damages, in which also the circumstances and property of defendant are always considered.

Bull. N. P. 27. 2. On the other hand, many circumstances go in extenuation of the offence, and mitigation of damages: As if it appears that plaintiff encouraged defendant's addresses to his wife, and connived at it.

Sir R. Worsley v. Bissett. Sittings after Hill. 1782. As in this case, where it appearing that this was the case from many circumstances; one in particular, from his shewing his wife naked when going into a bath, to defendant: The plaintiff, though a man of rank, obtained but one shilling damages.

* P. 433. S. C. * So defendant may give in evidence that plaintiff's wife had been criminal with others.

Bull. N. P. 27. So it may be proved that she eloped before; or that the husband turned her out of doors, and refused to maintain her,

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her, and that he kept company with other women; or that he consented to defendant's familiarity with her: all these are proper evidence, in mitigation of damages. Cibber v. Sloper, Per Lee. *ibid*.

So the defendant may give in evidence, that the wife had a bastard before marriage: but he will not be permitted to give evidence of the general reputation of her being a prostitute, or having been so; for that may have been occasioned by her familiarity with the defendant himself: though perhaps, after having proved her criminality with other men, it may be admitted to go into evidence of her general character. Roberts v. Marlston, at Hereford 1756. Per Willes C. J. Rigby v. Stephenson, at Stafford. 1745. Per Foster J. Bull. N. P. 27.

* 3. In this case, it was laid down by Lord *Mansfield*, as clear law, that if a woman is suffered by her husband to live as a prostitute, and a man is thereby drawn into *crim. con.* that no action will lie at the suit of the husband; for it is a damage without an injury: But if the wife lives in such a state of prostitution, without the privity of the husband, it will not bar the action, be she ever so profligate, but only go to the damages. *Pratt*, C. J. declared himself of this opinion about the same time. * Smith v. Allison, Per Ld. Mansfield, Sittings after Trin 5 G. 3. Bull. N. P. 27.

It is said indeed, in this case, that though the husband's privity and consent to the defendant's * familiarity and connection with his wife was clearly proved; yet that the action was held to lie: but the distinction between this case, and that before laid down by Lord *Mansfield*, is easily settled, the doctrine laid by his Lordship being of an indiscriminate prostitution, this only of a criminal connection with one person. Bull. N. P. 27. Cibber v. Sloper ante. * P. 434.

3. Of the PLEADINGS and COSTS.

The declaration in this case states the offence, by making an assault on the wife, &c. &c.

On this two cases have occurred:

1. As to Pleadings, 2. As to Costs.

In actions of assault the time of limitation is four years: *Cook v. Sayer Mich. 32 G. 2. B.R.* but in this action the gist of the action being the criminal conversation, and not the assault, not guilty within *six years*, Bull. N. P. is the proper plea under the statute of limitations; it being declared on as case for the criminal conversation. 28. 2 Burr. 753. S. C.

2. As to Costs.

This action is not considered so far an action of assault, Batchelor v. Bigg, 3 Will. 319. 2 Black Rep. 855. that in case the plaintiff has verdict with damages under forty shillings, that he shall lose his costs: For the special injury being the ground of the action, he shall have full costs, though the damages are under forty shillings.

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VOLUME THE FIRST.

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